91-97

No. 91-___

Supreme Court, U.S.
FILED
JUL 16 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

EARL STOUT and WILLIAM C. STOUT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the use of the civil standard of fiduciary duty to prove lack of authority and criminal intent under 18 U.S.C. § 666(a)(1) deprive petitioners of their due process rights under the Fifth Amendment or expand the statute beyond the intent of Congress?

2. Did the government's use of a criminal prosecution under 18 U.S.C. § 666(a)(1) to enforce a municipal union's constitution and bylaws violate the clear intent of Congress to exclude the internal affairs of municipal labor unions from federal regulation under Title 29 of the United States Code?

PARTIES TO THE PROCEEDINGS

Petitioner, Earl Stout, was president of District Council 33 Municipal Workers of the American Federation of State, County and Municipal Employees at the time of the indictment. This position also made him president of various affiliated organizations, including the District Council 33 Legal Services Fund, the District Council 33 Health and Welfare Fund, and John F. Kennedy Memorial Hospital.

Petitioner, William C. Stout, is the son of petitioner, Earl Stout. During the pertinent time period of the indictment he had been his father's principal assistant at John F. Kennedy Memorial Hospital. He was charged only on those counts which dealt with the operation of the hospital.

Respondent is the United States of America.

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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

EARL STOUT and WILLIAM C. STOUT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

This petition raises two questions. First, whether the prosecution in a criminal proceeding may constitutionally use a breach of fiduciary duty to prove the elements of authority and criminal intent required by 18 U.S.C. § 666(a)(1) or, indeed, whether Congress intended to punish conduct like petitioners'. Because fiduciary duty is a

civil concept, its use in a criminal trial serves to reduce the government's burden of proof and deprives defendants of their due process rights under the Fifth Amendment. In upholding the judgments of the district court, the United States Court of Appeals for the Third Circuit has permitted the creation of a new basis for criminalizing conduct by allowing a breach of a civil duty as evidence of criminally culpable conduct.

The second question addresses the issue raised by the criminal conviction of petitioners on the basis of the conduct of petitioner Earl Stout, an officer of a purely municipal labor union, on the basis of his violation of the union's internal rules, despite the clear intent of Congress to exempt such unions from the civil and criminal regulatory scheme of Title 29 of the United States Code. In this case, the court admitted into evidence the union's bylaws and other documents which regulate its internal affairs. The government then proceeded to use these documents to question the validity of the authority given by the union board to petitioner Earl Stout. The affirmance by the Third Circuit of the judgment of the district court, if upheld, would allow the government to interfere with the internal affairs of municipal unions although Congress has clearly declined to grant the federal government this power.

OPINIONS BELOW

The orders of the United States Court of Appeals for the Third Circuit were filed April 16, 1991. The order denying rehearing was filed May 14, 1991. The opinion

and order on post-verdict motions of the United States District Court for the Eastern District of Pennsylvania was filed on September 18, 1990. All are unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Section 371 of Title 18 United States Code provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for

any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisonment not more than five years, or both.

Section 666(a)(1)(A) of Title 18 United States Code provides in pertinent part:

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally or misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency. . . .

Section 1341 of Title 18 United States Code provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious

coin, obligation, security, or other article, anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Section 1962(c) of Title 18 United States Code provides in pertinent part:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

Petitioners and two other defendants were indicted in August, 1989. The indictment charged petitioners with several counts of embezzlement from a program receiving federal funds (18 U.S.C. § 666(a)(1)), one count of conspiracy to embezzle from such a fund (18 U.S.C.

§ 371), and a number of mail fraud counts (18 U.S.C. § 1341). Petitioner Earl Stout was also charged with a count of participation in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(c)). These charges were repeated, with some modification, in a superseding indictment returned on February 27, 1990.

At trial, the government introduced the union's constitution and bylaws into evidence. The judge's charge to the jury, given over vigorous objection by the defense, permitted the jury to consider these documents as evidence of limits on petitioner Earl Stout's authority. This charge was given despite uncontradicted evidence that petitioner Earl Stout had been granted virtually limitless authority by the union's board and had exercised that authority for many years. The trial judge also directed the jury to consider the evidence pertaining to authorization in assessing petitioner Earl Stout's mental state. Petitioner William Stout's responsibility was that of his father once removed, since there is no question that he acted on the basis of what he believed was his father's authority. On May 4, 1990, the jury convicted petitioners and one co-defendant of most counts with which they had been charged.

Petitioners and their co-defendant filed post-trial motions to challenge their convictions. On September 18, 1990, the United States District Court for the Eastern District of Pennsylvania granted petitioner Earl Stout's motion for acquittal as to one count of a violation of 18 U.S.C. § 666 and denied the remainder; it granted petitioner William C. Stout's motion on two counts and denied the remainder.

Petitioners filed appeals to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the judgments of the district court on April 16, 1991. Timely petitions for rehearing were filed; the Court of Appeals denied them on May 14, 1991. This petition followed.

REASONS FOR GRANTING THE WRIT

I. BECAUSE THE COURT PERMITTED THE PROSECUTION TO USE EVIDENCE OF A BREACH OF CIVIL FIDUCIARY DUTY TO PROVE THE ELEMENTS OF A CRIME, PETITIONERS WERE DEPRIVED OF NOTICE AS TO THE LEGAL CONSEQUENCES OF THEIR ACTIONS. PETITIONERS WERE ALSO DEPRIVED OF DUE PROCESS WHEN FACED WITH IMPRISONMENT AS A RESULT OF AN ALLEGED BREACH OF A CIVIL DUTY. FINALLY, PETITIONERS WERE PUNISHED FOR CONDUCT WHICH CONGRESS DID NOT INTEND TO MAKE CRIMINAL.

This case presents an unprecedented approach to criminalizing conduct. As a result, petitioners have been unconstitutionally deprived of their liberty without due process. The errors in admission of evidence and the charge to the jury permeate the case. The convictions on the counts in violation of 18 U.S.C. § 371, 18 U.S.C. § 1341, and 18 U.S.C. § 1962(c) are based on the alleged violations of 18 U.S.C. § 666. When that conviction is set aside, all other convictions must necessarily be set aside as a result.

By permitting the jury to convict petitioners for petitioner Earl Stout's failure to adhere to the union's internal

rules and his breach of his fiduciary duty to the union, the courts below have reduced the government's burden in proving the elements of 18 U.S.C. § 666. More importantly, where petitioners had every right to believe that such behavior would, at worst, subject petitioner Earl Stout to civil sanctions, both now face a term of imprisonment.

A criminal defendant has a fundamental right to due process. This includes reasonable notice of the legal consequences of his actions and an expectation that the government prove each element of the charge against him beyond a reasonable doubt.

In this case, the government was allowed to prove criminal lack of authority through evidence of petitioner Earl Stout's violation of the union's bylaws. The judge in his charge directed the jury to view petitioner Earl Stout's behavior in light of the bylaws and constitution of the union. If the jury found that petitioner Earl Stout's actions violated these rules, it could infer that he had no authority to act, despite evidence of a virtually limitless grant of authority to him by the union's board. Moreover, the court charged that since petitioner Earl Stout could never be authorized to breach his fiduciary duty to the union, if his acts amounted to such a breach, the jury could find that he acted without authority. Petitioner William C. Stout, in turn, derived his authority from that of petitioner Earl Stout, and his convictions turn on his father's convictions.

A breach of fiduciary duty has traditionally carried with it the threat of civil sanctions. Even if evidence of petitioner Earl Stout's acts proved such a breach, it was a

manifest deprivation of his due process rights to use the breach to convict him of a violation of a criminal code. Because conviction carries with it the possibility of imprisonment, the government is required to clearly prove each element of a crime. In order to meet its burden and show that petitioner Earl Stout knowingly acted without authority, the government needed to prove his lack of knowledge, not by implication through a possible violation of the union's rules or a violation of a civil duty, but beyond a reasonable doubt. The language of the statute makes it clear that Congress did not intend to impose a criminal penalty for a mere breach of a civil duty. This is even more so with respect to petitioner William Stout, who relied on his father's apparent authority.

Petitioners' behavior falls outside the reach of 18 U.S.C. § 666 when held to the standard established in *Morissette v. United States*, 342 U.S. 243 (1952). A breach of fiduciary duty is insufficient to establish a lack of authority or criminal intent. It is clear that petitioner – like petitioners here – could not knowingly act without authority when he believed he was authorized to act as he did and no evidence of criminal intent was introduced. As the Court noted, "[p]robably every stealing is a conversion, but certainly not every knowing conversion is a stealing." *Id.* at 271.

The Court distinguished a civil tort, where the state of mind of the defendant is generally irrelevant and an inadvertent act may result in a liability for damages. *Id.* at 270. The Court observed that "[t]he contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Id.* at 250.

Therefore, before imposing a criminal sanction, "[a] relation between some mental element and [the] punishment" is essential. *Id.*

II. THE GOVERNMENT'S USE OF THE CRIMINAL LAW TO REGULATE THE INTERNAL AFFAIRS OF A MUNICIPAL UNION IS A CLEAR VIOLATION OF THE CONGRESSIONAL INTENT TO EXEMPT SUCH UNIONS FROM TITLE 29 OF THE UNITED STATES CODE.

The power of the federal government to regulate labor unions is limited by 29 U.S.C. § 186(c)(5). A municipal union such as that headed by petitioner Earl Stout is employed by a political subdivision of the state and is therefore exempt from compliance in accordance with the terms of Title 29. This exemption is clear evidence of a decision by Congress not to regulate the internal affairs of such unions.

In this case, the government succeeded in circumventing this congressional intent by introducing into evidence the union's bylaws and constitution and scrutinizing petitioners' behavior against these rules in an attempt to prove petitioners' criminal culpability. Such unbridled scrutiny of the rules governing the union's internal affairs flies in the face of the exemption to Title 29 of the United States Code by equating criminality with a breach of fiduciary duty to the union.

The facts of this case are illustrative. Petitioners were not charged with embezzling union funds for their personal benefit but to benefit others whose service to the union or related entities did not justify their compensation. Under Title 29, such conduct would have led to a

civil investigation and, perhaps, civil restitution. Here, the courts below have permitted a criminal investigation, prosecution and conviction of the very municipal unions which Congress had exempted from Title 29 scrutiny.

CONCLUSION

For all these reasons, petitioners respectfully request that its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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Dated: July 15, 1991

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1703

UNITED STATES OF AMERICA

v.

EARL STOUT,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 89-317-01)
District Judge: Honorable J. William Ditter, Jr.

Argued April 9, 1991

BEFORE: SLOVITER, *Chief Judge*, and GREENBERG and WISDOM,* *Circuit Judges*

(Filed: APR 16 1991)

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*Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that (1) even viewed in the light most favorable to the government, the evidence was insufficient to convict appellant of the common law crimes charged, where the evidence showed at most a violation of fiduciary duty, without any personal benefit, direct or indirect, to appellant and without any acts of concealment whatsoever; (2) the district court's instructions to the jury, taken as a whole, allowed the jury to convict appellant for conduct that was not within the proscription of the statutes he was charged with violating, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk
APR 16 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1828

UNITED STATES OF AMERICA

v.

WILLIAM C. STOUT,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 89-317-02)
District Judge: Honorable J. William Ditter, Jr.

Argued April 9, 1991

BEFORE: SLOVITER, *Chief Judge*, and GREENBERG and WISDOM,* *Circuit Judges*

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*Honorable John Minor Wisdom, Senior Circuit Judge of the Uanited [sic] States Court of Appeals for the Fifth Circuit, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that (1) the lower court erred in denying judgment of acquittal for this corporate employee prosecuted under the unsustained theory that he had actual knowledge that his corporate superior lacked authorization from the corporate board of directors for certain expenditures; (2) a new trial should be awarded because it was error to have instructed the jury that a breach of fiduciary duty would render a corporate expenditure "unauthorized" within meaning of the 18 U.S.C. Section 666, even if the board of directors had given authority for the expenditure and it had been made without an anti-corporate animus; (3) the court's instructions on authority generally, particularly its distinction between "valid" and "invalid" authority, were substantially in error and warrant a new trial, it is

ADJUDGED AND ORDERED that judgment of the district court be and is hereby affirmed.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk
APR 16 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1703 and 90-1828

UNITED STATES OF AMERICA

v.

EARL STOUT and WILLIAM C. STOUT

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 89-317-01 and 89-317-02)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, and
BECKER, STAPLETON
MANSMANN, GREENBERG, HUTCHINSON,
SCIRICA, COWEN,
NYGAARD, ALITO, and WISDOM,* *Circuit Judges*

The petition for rehearing filed by Appellants Earl Stout and William C. Stout in the above caption matter having been submitted to the judges who participated in the decision of this court and to all the other available

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*Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ Morton I. Greenberg
Circuit Judge

DATED: MAY 14 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	NO. 89-317-1-2-3
EARL STOUT, WILLIAM STOUT, and CYNTHIA BULLOCK	:	

OPINION AND ORDER

DITTER, J. September 18, 1990

On May 4, 1990, a jury convicted defendants Earl Stout, William Stout, and Cynthia Bullock of various crimes stemming from the misappropriation of funds belonging to the District Council 33 Municipal Workers of the American Federation of State, County, and Municipal employees, AFL-CIO ("AFSCME"), an organization of affiliated labor unions. The defendants filed post trial motions to challenge their convictions. Earl Stout moves alternatively for judgment of acquittal, arrest of judgment, and for a new trial. William Stout and Cynthia Bullock move alternatively for judgment of acquittal and for a new trial. For all of the reasons discussed below, I will grant the Stouts' motions for judgment of acquittal as to count seven, and William Stout's motion for judgment of acquittal as to count six. In all other respects the defendants' motions will be refused.

I. FACTS

Earl Stout[1] is a former president of District Council 33. He served in this capacity from 1974 until May 11,

[1] Earl Stout is the father of defendant William Stout. Unless otherwise noted, any references to "Stout" throughout this opinion are to the defendant *Earl* Stout.

1988, when he was defeated in a bid for re-election. As president of District Council 33, Stout served as the chairman of the District Council 33 Executive Board, and as chairman of the board of trustees of the District Council 33 Legal Services Fund and the District Council 33 Health and Welfare Fund, employee benefit funds managed by the organization. He was also the acting executive director and president of the John F. Kennedy Memorial Hospital ("JFK Hospital"), a non-profit corporation owned by the union and administered by the same individuals who served on the board of trustees of the Health and Welfare Fund.

Stout's son, William Stout, was Stout's assistant at JFK Hospital from 1984 through May of 1988. He was responsible for the daily administration of the hospital and supervised its accounting department.

Cynthia Bullock is the former director of the District Council 33 Legal Services Plan. The Legal Services Plan is comprised of a staff of attorneys and personnel who provide free legal assistance and representation to union members and their dependents. Bullock held this job from 1974 until November of 1984, when Stout fired her.

Stout's history with District Council 33 was very colorful and very public. In 1974, he was elected president by the union's executive board to fill a vacancy. The next regular election was in 1976, and Stout ran for president unopposed. He was re-elected by a wide margin in 1980, and again in 1984. Stout was a hard-working union leader who gained notoriety for his tough dealings at the

bargaining table. During his presidency, he garnered significant wage increases and unprecedented benefits packages for the city's thirteen thousand employees. Unfortunately, Stout had little tolerance for democratic procedure. His tenure as union president was marked by considerable strife within the District Council 33 Executive Board as board members tried unsuccessfully to require greater accountability from Stout. Stout often refused to provide financial audits to the various union boards delineating his expenditures of union funds. He withheld information about expenditures, about patronage and "no-show" jobs, about salary increases for himself and his supporters, and he refused to allow discussion at executive board meetings concerning his control over union finances and hiring decisions.

In 1985, when Stout appointed himself acting executive director of JFK Hospital after the previous director resigned, he assumed greater unilateral control over the hospital's administration and finances. Similarly, with respect to both the Health and Welfare Fund and the Legal Services Fund, Stout exercised "carte blanche" authority, spending money from the funds without prior approval or subsequent ratification from the appropriate board of trustees.

Not surprisingly, Stout's unrestrained pursuit of a personal agenda took its toll not only on union morale, but on union finances. Between 1985 and 1988 the union's Legal Services Fund lost over one million dollars in assets. Similarly, JFK Hospital, a financially stable institution before Stout assumed the executive directorship, was plagued by financial difficulties during his tenure. The

Health and Welfare Fund, which financed union members' medical and related expenses, was frequently delinquent in its payments to health care providers.

On August 15, 1989, the grand jury indicted Earl Stout, William Stout, Cynthia Bullock, and Frances Rooney. Rooney is the former vice-president of the District Council 33 Executive Board. On February 27, 1990, the grand jury returned a superseding indictment which eliminated several of the original counts. In the superseding indictment, Earl Stout and William Stout were charged with nine counts of embezzlement from JFK Hospital, an organization which receives federal funding, in violation of 18 U.S.C. § 666(a)(1)(A).[2] Frances Rooney was

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[2] Section 666(a)(1)(A) of Title 18 states in pertinent part

> Whoever . . . being an agent of an organization . . . embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that (i) is valued as $5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization. . . . [commits a federal offense].

Upon agreement of all counsel, in my charge to the jury, I used the term "embezzle" to stand for the collective words, "embezzle, steal, obtain by fraud, or without authority, knowingly convert or intentionally misapply." N.T. 4/30/90 at 20-30. Having agreed to my using the word "embezzle," counsel for William Stout then sought to create possible error by disavowing the agreement. After he conferred with other defense counsel, he again agreed to my using the word "embezzle." The elimination of the term "misapplies," which is used in the statute, was recognized by defense counsel as an advantage to them. *Id.* Whether counsel for William Stout is assigning as

(Continued on following page)

charged in one of these counts. The Stouts and Rooney were also charged with one count of conspiracy to violate 18 U.S.C. § 666(a)(1)(A). The government charged Stout with thirty-three counts of mail fraud pursuant to 18 U.S.C. § 1341. Thirty-two of these counts, eleven of which also named Cynthia Bullock, alleged fraudulent misappropriations of money from the Legal Services Fund. One count charged Earl Stout and William Stout with the fraudulent transfer of property belonging to JFK Hospital. Finally, the government charged Earl Stout with one count of conducting the affairs of District Council 33 through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). The twenty-six racketeering acts alleged in connection with the RICO count were mail fraud violations as charged in the mail fraud counts.[3]

Trial began on April 5, 1990. After the government presented its case, I granted Stout's motion for judgment of acquittal as to two of the embezzlement counts and one of the mail fraud counts for insufficient evidence. I struck various portions of the superseding indictment on

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(Continued from previous page)

error the use of the term "embezzle" to the exclusion of the related terms used in the statute is unclear. *See* Defendant's Memorandum of Law in Support of Post Trial Motions (document no. 29) at 9-10. In any event, defendant's express waiver of his right to an instruction which included all of the related terms, N.T. 4/30/90 at 30, renders moot whatever objection he now raises.

[3] The specific allegations contained in each count are discussed in detail in the "Discussion" section of this opinion.

the same basis. The defendants then presented their evidence and, after a four-week trial, the jury convicted Stout of six counts of embezzlement, forty-three counts of mail fraud, and one count each of RICO and conspiracy to embezzle. William Stout was convicted of seven counts of embezzlement, and one count each of conspiracy to embezzle and mail fraud. The jury found Earl Stout and William Stout not guilty of two counts of embezzlement. Bullock was convicted of eleven counts of mail fraud as charged. The jury found Rooney not guilty of all charges.

II. DISCUSSION

A. Earl Stout's Motion for Judgment of Acquittal

Earl Stout seeks a judgment of acquittal on all counts charged in the indictment on the basis that the evidence was insufficient to satisfy the government's burden of proof. It is well-settled that a motion for judgment of acquittal must be denied if any trier of fact could have found from the evidence the essential elements of the crime beyond a reasonable doubt. I must therefore determine whether the evidence, viewed in the light most favorable to the prosecution, supports the jury's guilty verdict. The verdict may be overturned only when the record contains no evidence, regardless of how it is weighted, from which the jury could have found guilt beyond a reasonable doubt. *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1152 (1990). In this case, there was ample evidence to convict Stout on all but one of the counts with which he was charged, the exception being count seven, in which Stout was charged and convicted of having the

hospital make unauthorized payments of a staff surgeon's medical malpractice insurance between September of 1986 and March of 1988.

1. Count Seven – Malpractice Insurance Payments

The government charged Stout with directing the withdrawal of funds from JFK Hospital without authorization from the hospital's board of directors to pay $95,646 for the personal medical malpractice insurance of Dr. John P. Leichner, a surgeon on the hospital's staff, in violation of 18 U.S.C. § 666(a)(1)(A). According to the testimony of Sandra Green, a hospital-employed "risk manager" who directed the hospital's self-insurance plan,[4] Stout attempted to implement a program so that all the doctors who worked at the hospital, both attending and salaried,[5] would be covered by the hospital's self-insurance plan. N.T. 4/12/90 at 93-98. Green testified that Stout planned to cover attending physicians' malpractice insurance under the self-insurance program not only for the work they performed at the hospital, but for medical-related work they performed anywhere at any time. This

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[4] The hospital's self-insurance program was essentially a trust fund managed by the hospital which paid for the defense of malpractice claims brought against doctors covered by the program. Self-insurance is designed to take the place, at least in part, of private, commercial insurance. N.T. 4/12/90 at 86.

[5] "Attending" or "staff" doctors have privileges to admit patients to JFK Hospital, but do not spend all of their time there. They may, therefore, receive compensation from JFK as well as from other institutions or from private practice. A "salaried" physician, on the other hand, is employed solely at JFK Hospital. N.T. 4/12/90 at 89, 91.

way, attending doctors would not need their own private insurance and would still have the freedom to practice medicine at a variety of hospitals. The extended self-insurance program was initiated as an incentive to attract and keep quality doctors at JFK. N.T. 4/12/90 at 123-126. With a minimum patient admission requirement as a prerequisite to participation, the plan was also designed to bring patients into the hospital. N.T. 4/12/90 at 97.

Green testified that she later learned, and immediately informed Stout, that the self-insurance program could not legally be utilized by attending physicians in place of private insurance, except possibly to cover those doctors' malpractice liability for the work they performed at JFK. N.T. 4/12/90 at 91, 104. According to the government's evidence, Stout did not abandon his goal of providing malpractice insurance to the attending doctors at JFK, but instead attempted to supplement the income of several doctors, including Dr. Leichner, by paying all or a portion of their private malpractice insurance premiums. The government introduced an attorney's opinion letter directed to a doctor at JFK which was subsequently forwarded to Stout in which the attorney cautioned that the payment of private malpractice insurance *may* be a violation of medicare anti-fraud abuse principles. N.T. 4/16/90 at 42-43. When the accused presented their defense to the jury, counsel introduced a letter directed to Earl Stout from an attorney with a law firm which had represented the union in a variety of legal matters in which the attorney stated that, "since the payment of doctors' insurance premiums is intended to be part of their compensation, the hospital is empowered to pay those premiums." N.T. 4/24/90 at 86; Dft. Exh. 216. Earl

Stout testified that he had no reason to doubt the advice that a trusted lawyer had given him. N.T. 4/25/90 at 147-149.

Naturally, it is the province of the jury to weigh the evidence in a criminal trial. In this case, however, it is now apparent that count seven should not have been submitted to the jury because there was *no* evidence adduced at trial to support the government's theory that private malpractice insurance payments to Dr. Leichner constituted embezzlement under 18 U.S.C. § 666(a)(1)(A).

According to the testimony of the government's own witnesses, Stout had the JFK board's authority to set each doctor's compensation. N.T. 4/10/90 at 95; N.T. 4/16/90 at 176-177; N.T. 4/18/90 at 48-49. The government presented no evidence that the payment of malpractice insurance premiums constituted anything other than "compensation." Although the government argued that a close personal friendship existed between Stout and Leichner which resulted in his receiving preferential treatment in the form of "unauthorized" malpractice insurance payments, the defendants presented uncontroverted evidence that several other doctors in the hospital received compensation in the form of malpractice insurance as well. N.T. 4/24/90 at 91-94; Dft. Exh. 218. While none of these payments were as substantial as Dr. Leichner's, given Stout's authority to set doctors' pay, the fact that Stout exercised this authority subjectively, or even with demonstrable partiality, did not make his behavior criminal. Dr. Leichner testified that his insurance rates were particularly high because of the risk associated with his field of medicine. N.T. 4/12/90 at 120. Though he did not admit as many patients to the hospital

as some of the other doctors who received less malpractice insurance compensation than he did, N.T. 4/24/90 at 182-195, Dr. Leichner performed surgery on many of the patients admitted by others. There was no evidence that the annual malpractice insurance payments he received from JFK were intended to compensate him for anything other than his services to the hospital.

The government maintained that it sought to introduce the attorney opinion letter solely as evidence of Stout's *knowledge* that such payments may be a violation of medicare law. N.T. 4/12/90 at 207. However, Stout's knowledge, or lack thereof, that the payment of private malpractice insurance premiums "may" be a violation of the medicare statute is irrelevant since Stout was not charged with such a violation, nor did the government prove such a violation at trial. Had the government included a medicare fraud charge in the indictment or stated in count seven that Stout's "lack of authority" derived from the inability of the JFK Hospital Board of Directors to authorize him to pay compensation which violated the medicare statute, then the result might have been different here. Because the government charged only that Stout lacked the authority to direct JFK to pay Dr. Leichner $95,646 to cover his malpractice insurance premiums, absent evidence that the payments did not constitute "compensation" for Dr. Leichner's services to the hospital and that the payments were, in fact, illegal and thus unauthorized, Stout must be acquitted of the charges in count seven.[6]

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[6] William Stout was also charged in count seven. He, too, must be acquitted of this count for the reasons stated herein.

2. Counts Three, Four, Eight, and Nine – The "Ghost" Employees

The jury convicted Stout of six other counts of embezzlement from JFK Hospital pursuant to 18 U.S.C. § 666(a)(1)(A). Four of these counts charged Stout with paying supporters to be his "consultants" at the hospital when, in reality, these individuals performed no services for the hospital. Stout argues that the government failed to sustain its burden of proof that the money he directed be paid out of JFK Hospital funds to Charles Meyers (count three), William Brown (count four), Richard Lagocki (count eight), and Hillyard Jones (count nine), the so-called "consultants," was not authorized by the hospital board of directors and was intentionally concealed from the board.[7] Stout also argues that there was no evidence that he personally benefitted in any way from the payments to third parties. I find that there is ample evidence to support Stout's conviction on counts three, four, eight, and nine, and will therefore deny his motion.

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[7] Stout does not challenge the Government's evidence with respect to any other elements of the section 666 counts, *i.e.*, that JFK hospital receives at least $10,000 in federal funds annually; that each count alleged takings which exceeded $5,000; that the money taken was owned or controlled by JFK; that Stout was an agent of JFK; and that Stout had possession of the funds in question at the time of the illegal act. These elements were either the subject of a stipulation among all the parties, Gov't. Exh. 146, or were uncontested at trial. Stout also does not argue that the Government failed to prove that the "ghost" employees – Meyers, Brown, Lagocki, and Jones – were paid the amounts charged. *See id.* I therefore need not discuss the sufficiency of the evidence as to these elements.

There is no question that according to both the 1975 and the 1987 by-laws of JFK Hospital, Stout, as acting executive director of the hospital between 1985 and May of 1988, had the authority "to hire and employ the necessary personnel for the efficient operation of the Corporation." Gov't Exhs. 12B, 12C. Although the 1975 by-laws give the executive director the power to hire personnel and to determine their compensation "subject to the right of the board of directors to change such actions," implying that the executive director could act without prior approval from the board, the 1987 by-laws state that the power to hire and employ is "with the approval of the Board of Directors," implying that the board must sanction each of the director's hiring decisions. There was some dispute at trial as to whether the 1987 by-laws had ever been officially adopted by the JFK Hospital Board of Directors;[8] nonetheless, the government does not seriously contend, nor does the witness' testimony support the inference, that Stout's failure to bring a particular hiring decision before the board of directors to either "approve," pursuant to the 1987 by-laws, or to exercise its right "to change such action," pursuant to the 1975 by-

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[8] Al Johnson, the former secretary-treasurer of the District Council 33 Executive Board and a member of the JFK Hospital Board of Directors, testified that the 1987 by-laws were adopted. N.T. 4/10/90 at 87. Leonard Spear, an attorney for the union who attended JFK Hospital board meetings, testified that he had no recollection of the 1987 by-laws being adopted by the board. N.T. 4/24/90 at 11. The minutes of the board meeting at which the 1987 by-laws were discussed states that the by-laws were "approved," but does not state whether a vote was taken or a motion made to adopt them. Gov't Exh. 13, minutes of Jan. 14, 1987.

laws, in itself, constituted a violation of section 666. Instead, the issues at trial concerning authorization were whether Meyers, Brown, Lagocki, and Jones did no work for the hospital in exchange for pay, whether Stout intended when he hired them that they do no work for the hospital, and whether Stout unlawfully exceeded his authority to "hire and employ the necessary personnel" when he directed that these men be paid to do nothing, much less "consulting."

Both Brown and Jones testified that they were paid by, but did not work for, JFK hospital. N.T. 4/12/90 at 71; N.T. 4/11/90 at 203, 206, 214. Joyce McKay, the manager of the accounting department at the hospital who cut the paychecks for hospital personnel, testified that Jones was paid money only because he was seriously injured and could not work. N.T. 4/10/90 at 61. Lagocki testified that he was hired by Stout as a "part-time liaison" to encourage the membership to use the hospital. N.T. 4/12/90 at 32, 34. He testified that Stout approached him and offered him the position. N.T. 4/19/90 at 32. In view of the fact that Lagocki maintained no records of his time, kept no written records of his activities, N.T. 4/12/90 at 35, had no designated hours to work other than "anytime [he] had a chance," N.T. 4/12/90 at 34, never submitted a bill or invoice for his services, N.T. 4/11/90 at 27, and that the work he was supposedly hired to do was the designated work of the local union presidents, N.T. 4/12/90 at 37, a reasonable jury could certainly conclude that Lagocki's job was a sham.

Charles Meyers testified that he approached Stout for a part-time job and was offered a position working "as many hours as [he] wanted" as hospital security. N.T.

4/12/90 at 50. Meyers testified that he had not told anyone at the hospital he was working there, had no written employment contract, and had no contact with the hospital security department at all. N.T. 4/12/90 at 52. His contention that his written records of his activities at the hospital were "stolen" contradicted his grand jury testimony. N.T. 4/12/90 at 54-55. A reasonable jury could certainly have concluded that Meyers' security-type "consulting" position was a pretext and that Meyers, in fact, did nothing that was security-related at the hospital.

Under all the circumstances, it was reasonable for the jury to conclude that Stout never intended that Meyers, Brown, Lagocki, and Jones do any work. There was no suggestion that any one of them had any education, training, knowledge, or experience to make him a source of expertise who would benefit the hospital. There was no evidence their advice had ever been sought or offered or that they had ever "consulted" with anyone about anything. By his own testimony, Jones was far too feeble to be of any use to the hospital. N.T. 4/11/90 at 201. Stout admitted that Jones was simply receiving "financial help" from the union following a serious accident which left him unable to return to his job. N.T. 4/25/90 at 150. George Wroten, Ann Cohen, and Frances Rooney testified that, as members of the hospital board of directors, they were never made aware of the fact that Stout had hired any of these so-called "consultants." N.T. 4/16/90 at 174; 4/18/90 at 33-55; 4/29/90 at 123-125. Upon review of the minutes of the hospital board meetings, Al Johnson confirmed that Stout never mentioned to the board that these "consultants" had been hired and that the board was never asked to consider or to approve Stout's decision.

N.T. 4/6/90 at 30-45; Gov't Exh. 13. Leonard Tilghman testified that he and other union local presidents and business agents had become so frustrated by Stout's persistent refusal to answer their questions at executive board meetings about his expenditure of and inability to account for union funds, including employee benefit funds, that they submitted a detailed letter to Stout formally requesting, among other things, detailed payroll information. N.T. 4/17/90 at 165-176; Gov't Exh. 104. Stout refused to answer any of the questions presented. N.T. 4/17/90. Johnson testified that Meyers, Brown, and Lagocki were supporters of Stout and that at one time, each of them held a position of authority – either as president or business agent – within one of the union locals. N.T. 4/6/90 at 29, 32, 38. Meyers' local was the largest local in the District Council. N.T. 4/12/90 at 48. There was more than sufficient evidence from which a reasonable jury could conclude that Stout rewarded his supporters – in particular, his influential supporters – with no-show jobs at the hospital and the he knew that this practice was beyond the scope of his authority as acting executive director of the hospital "to hire and employ the necessary personnel for the efficient operation of the Corporation," as articulated in the hospital bylaws. It was reasonable for the jury to infer an intent to misapply (*i.e.*, embezzle) hospital funds from Stout's nondisclosure and from his efforts to conceal his activities from the hospital's board of directors.

With respect to Stout's final contention that there was no evidence that he personally benefitted from his arrangement with the "ghost" employees, neither counsel's research nor mine provided any legal support for the

contention that disproving "personal gain" was an element of the government's burden of proof. Moreover, the language of section 666(a)(1)(A) negates the idea that personal benefit is a prerequisite for guilt. The language makes it a crime to convert to the use of *any* person other than the rightful owner and makes it a crime to misapply property. Obviously, "any person" excludes the idea that the defendant must be benefitted, as does the concept of misapplication. Finally, I note for the record that the government presented sufficient evidence that Stout stood to gain political support from the union locals whose leaders he rewarded and patronized.

3. Count Six – The Trip to Ethiopia

With respect to count six, Stout was charged and convicted of using JFK Hospital funds to pay the salaries and expenses incurred by William Stout and three other union employees for a non-hospital related trip to Ethiopia without authorization from the hospital board of directors. In May of 1985, at Stout's direction, the union's Health and Welfare Fund donated $150,000 to "Save the Children," an organization providing relief to famine victims in Ethiopia. Stout directed that the money be used to purchase grain, and William Stout, two other hospital employees, and an employee of District Council 33's dental plan, travelled to Ethiopia at the hospital's expense ostensibly to ensure that the grain arrived at its intended destination. Stout alleges that "there was no evidence whatsoever that [I] derived any personal benefit, direct or indirect, from the expenditure and that the payments were never concealed in any way." Since the government

was not required to prove that Stout personally benefitted from his misapplying hospital money, I need not address the evidence, or lack thereof, that Stout stood to gain anything from the trip to Ethiopia. Similarly, active concealment is not an essential element of embezzlement under section §666, although, as discussed previously, concealment may be relevant to the question of his intent.

To satisfy its burden of proof that Stout lacked authorization from the hospital board to pay the various expenses associated with the trip, the government introduced the minutes from both the JFK Hospital board meetings and from the Health and Welfare Board meetings which preceded the trip to show that the issue was never raised at any meeting. Gov't Exhs. 10, 13. Al Johnson confirmed that Stout never sought approval for the expenditure from the hospital board of directors. N.T. 4/6/90 at 70. Although the District Council Executive Board had voted "to do something" for the Ethiopian famine victims, the evidence showed that the executive board never voted on the type of relief the union would provide, the amount of money it would spend, or the source of the funds. N.T. 4/9/90 at 147-148; Gov't Exh. 5, minutes from May 14, 1985. The government also introduced the AFSCME Financial Code, which governed the union's financial affairs, Gov't Exh. 3; the District Council 33 Constitution, Gov't Exh. 4; and the various hospital by-laws, Gov't Exhs. 12A, 12B, 12C, as evidence that Stout was required to obtain prior approval from an appropriate board of directors to spend union funds and that such approval would be reflected in the minutes of the board meeting at which the approval was granted. The jury could properly have inferred that because the

decision to donate $150,000 worth of grain was made unilaterally by Stout, the decision to spend hospital funds to escort the grain was also made unilaterally. The jury was entitled to conclude, based on the testimony of both executive and hospital board members, that Stout had never received "blanket"corporate authority to spend the hospital's money at whim. From Stout's failure to inform either the hospital board or the executive board at any time that the hospital had financed a trip to Ethiopia and from his refusal to provide an accounting of any of the funds expended on behalf of "Save the Children," even when requested in writing to do so by eleven executive board members, Gov't Exh. 104, ¶6; N.T. 4/12/90 at 176, the jury could properly determine that Stout acted with the requisite intent to deprive the hospital of its money in violation of 18 U.S.C. §666(a)(1)(A).

4. Counts Twelve through Forty-Three – Mail Fraud

The jury convicted Stout of defrauding District Council 33 and its Legal Services Fund of substantial sums of money between 1985 and 1988 in violation of the mail fraud statute, 18 U.S.C. §1341, by paying Legal Services Fund money on behalf of Cynthia Bullock and to Judge Williams for so-called "consulting" services when, in fact, Bullock and Williams did no compensable work for the Legal Services Plan. Stout contends that the government failed to prove beyond a reasonable doubt that Bullock and Williams performed no services for the Legal Services Plan. Stout also maintains that there was insufficient evidence at trial of an intent to conceal the

payments from the Legal Services Board of Directors and that "there was no evidence whatsoever that Earl Stout received any personal benefit, directly or indirectly," from this money.

With respect to the issue of whether Bullock and Williams performed services for the Legal Services Plan, Stout ignores the abundance of evidence to the contrary. There is no dispute that money was paid by the Legal Services Fund for Bullock's health insurance, car insurance, car repairs, and deferred compensation plan over a period of four years after Stout had fired her as director of the Legal Services Plan. Gov't Exhs. 51-64, 146. Jacqueline Green, who replaced Bullock in March of 1985 after she was terminated, testified that to her knowledge, Bullock did no work for the Legal Services Plan, consulting or otherwise, after August of 1985. N.T. 4/19/90 at 18, 21-22, 56, 79. As director of the plan, Green was required to supervise the staff and administer the plan's funds, including the payroll. N.T. 4/19/90 at 8. She was therefore in a position to know whether Bullock performed any services for the plan. Al Johnson, the secretary-treasurer of District Council 33 and of the Legal Services Fund, testified that both Stout and Bullock told him that Stout had fired Bullock and that she would no longer be working for the Legal Services Plan. N.T. 4/6/90 at 82. He said that Bullock sought his consolation and advice several times after her termination. N.T. 4/10/90 at 61, 64-65, 107-108. Johnson sat on the Legal Services Board of Trustees and managed the plan's finances. N.T. 4/5/90 at 129. He was also a close personal friend, supporter, and union associate of Stout's. N.T. 4/5/90 at 138-139, 164;

N.T. 4/9/90 at 174. Nonetheless, despite his close relationship with both Bullock and Stout and his position on the Legal Services Board, he was never informed that Stout had rehired Bullock to work for the plan. He was not aware of any services which Bullock performed for the plan after Green was hired in March of 1985. N.T. 4/9/90 at 70; N.T. 4/10/90 at 116. There was ample evidence from which the jury could conclude that Bullock never performed any consulting services for the Legal Services Plan and did no work of any king for the plan after August of 1985. Nonetheless, payments on her behalf continued through April of 1988.

According to Judge Williams' testimony, Stout hired him and arranged for him to be paid $100,000 a year as a personal legal consultant for the privilege of "picking" his brain ever so often. N.T. 4/18/90 at 188-189. Williams stated that he never represented Stout in any legal capacity, that he never filed any briefs or pleadings or wrote any letters on Stout's behalf, and that he often did not hear or speak to Stout for months at a time. N.T. 4/18/90 at 187-189. Williams had no written contract with Stout. N.T. 4/18/90 at 213. When asked how frequently he performed his "legal consulting" services for Stout, Williams replied, "[I]t wasn't very often." N.T. 4/18/90 at 189. In fact, during the time that Williams was supposedly performing his "consulting" work, the Legal Services Fund was already paying an annual retainer to Richard Sprauge, Esquire, and to Leonard Spear, Esquire, to provide the union with legal services. N.T. 4/26/90 at 13-16. The evidence supported the jury's conclusion that Stout paid a significant amount of Legal Services' money

to Williams between 1986 and 1988 with the understanding that Williams would do no work for the Legal Services Plan.

There was also evidence that Stout concealed the payments for Bullock and to Williams from the executive board and from the Legal Services Board of Trustees. There is no record in the minutes from the board meetings of any vote to approve the hiring of "personal consultants" to Stout, Gov't Exh. 8, despite language in the Legal Services Fund Declaration of Trust which gives to the board of trustees the power to hire "consultative services," Gov't Exh. 7 at article IV, section 1D. Charles Butler, a Stout supporter and a former trustee of the Legal Services Fund, testified that Stout never informed him or the Legal Services Board of Trustees that Bullock and Williams were being paid as consultants. N.T. 4/18/90 at 168. Frances Rooney, also a Stout supporter and a trustee of the fund, testified that the issue of payments to Bullock and Williams was never discussed, authorized, or approved by the Legal Services Board. N.T. 4/23/90 at 128-130. Leonard Tilghman testified that as a member of the executive board, he frequently requested financial information from Stout concerning the payrolls and expenditures of JFK Hospital, the Legal Services Plan, and the Health and Welfare Plan. Stout routinely refused these requests and announced that he had no intention of answering a letter directed to him and signed by eleven executive board members seeking, among other things, an accounting of individuals on the Legal Services Plan payroll, in particular an accounting regarding Bullock, "the former director" of the plan. N.T. 4/17/90 at 173-176. The jury could properly have decided that

Stout's persistent refusal to disclose information to which his fellow board members were entitled amounted to active and intentional concealment.

Once again, there is no requirement that the government prove that a defendant personally benefitted from unauthorized expenditures to convict him of mail fraud. Indeed, with respect to the payment for Bullock and to Williams, if Stout concedes that he received no benefit in exchange for these payments, he is hard-pressed to argue that any "personal consulting services" were ever performed. Stout's purported non-receipt of any *quid pro quo* from his "personal consultants" serves to prove rather than to disprove that he committed a fraud upon District Council 33 and the Legal Services Fund.

The jury also found Stout guilty of defrauding District Council 33 and JFK Hospital of two life insurance policies insuring Earl Stout's life of which the hospital was the rightful owner and beneficiary. Stout says that there is no evidence that he concealed the change of ownership and beneficiary of life insurance policies from the hospital's board of directors. The jury could properly have determined that Stout had a fiduciary duty to disclose to the hospital's board of directors any transfer which caused the hospital to lose its interest in or its claim of right to money or property. Stout's failure to make such a disclosure after signing the forms which he knew would deprive the hospital of its ownership interest in and its right to collect proceeds from his life insurance policies constituted a concealment through intentional nondisclosure. There was sufficient evidence of Stout's intent to defraud JFK Hospital.

5. Count Two – RICO

The jury concluded that Stout committed each of the twenty-five racketeering acts charged in count two of the indictment. These racketeering acts were the same acts of mail fraud charged in counts twelve through forty-three; therefore, any challenge to the sufficiency of the evidence with respect to Stout's participation in the racketeering activities is foreclosed by the discussion in section II.A.4., *supra*.

The RICO enterprise named in count two is District Council 33. For Stout to be convicted of violating the RICO statute, 18 U.S.C. §1962(c), the government was required to prove that he participated in the affairs of District Council 33 through a pattern of racketeering activity. Stout argues that his RICO conviction must be overturned because "there was no evidence of any criminal activity in connection with District Council 33 . . . . [T]he expenditure of funds that were challenged in the indictment all came from JFK Hospital or the Legal Services Board."

Stout's argument is meritless. The RICO statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). The government charged in the indictment and proved at trial that JFK Hospital and the Legal Services Fund are component parts of District Council 33. District Council 33 is an umbrella organization which owns and controls JFK Hospital, the Legal Services Fund and its affiliated plan, and the

Health and Welfare Fund and its affiliated plan.[9] There was testimony at trial that money often flowed freely among the various funds and JFK Hospital. District Council 33 is therefore an "association" under the RICO statute which became the "enterprise" through which Stout conducted his racketeering activities. The fact that the funds Stout withdrew, as alleged in the twenty-five

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[9] The Legal Services Fund and the Health and Welfare Fund are employee benefit trust funds created and managed by the Executive Board of District Council 33 to serve the members of the District Council and their dependents. The Legal Services Fund finances the Legal Services Plan. The Health and Welfare Fund finances the Health and Welfare Plan. Gov't Exhs 7, 9. Members of the executive board incorporated JFK Hospital in 1960. The hospital is owned and managed by the union. N.T. 4/5/90 at 183; Gov't Exh. 11. The president of District Council 33 serves as chairman of the boards of trustees of the Legal Services Fund and the Health and Welfare Fund and also serves as president of JFK Hospital. Gov't Exhs. 7, 9, 12A, 12B, 12C. The vice president and secretary-treasurer of the executive board serve as vice chairman and secretary-treasurer, respectively, of the Legal Services Fund. Gov't Exh. 7. The remaining members of the board of trustees of the Legal Services Fund are selected from the executive board, with the exception of one "public trustee." Gov't Exh 7. The secretary-treasurer of the executive board also serves as secretary-treasurer of the Health and Welfare Fund. The remaining members of the board of trustees of the Health and Welfare Fund consist of officers elected by each of the local unions affiliated with District council 33. The board of trustees of the Health and Welfare Fund serves as the hospital's board of directors. The Executive Board of District Council 33 negotiates contracts with the City of Philadelphia to determine the amount of money the City will contribute to the Legal Services Fund and to the Health and Welfare Fund on behalf of the union members.

racketeering acts, came from the Legal Services Fund and JFK Hospital, and not from a specific fund labeled "District Council 33," is irrelevant. Because the Legal Services Fund and JFK Hospital are parts of the RICO enterprise, conduct which affects them necessarily affects District Council 33.

6. Count One – The Conspiracy

Stout contends that there was no evidence at trial that he and his son conspired to embezzle funds from JFK Hospital. Stout is incorrect. The testimony of various witnesses, including the conspirators themselves, provided more than sufficient circumstantial evidence of an agreement between Earl and William Stout to deprive the hospital of money which rightfully belonged to it without the acquiescence of its board of directors.

William Stout was appointed by his father to be the "special assistant" to the executive director of the hospital. William, along with his father, ran the day-to-day affairs of the hospital. N.T. 4/10/90 at 140-141; N.T. 4/11/90 at 74-75; N.T. 4/24/90 at 66-68. William described himself as his father's "right hand man." N.T. 4/24/90 at 69. Both Earl and William Stout confirmed that they discussed hospital operations on a daily basis and that they kept each other apprised of practically all of their respective activities on behalf of the hospital. N.T. 4/24/90 at 175-176; N.T. 4/25/90 at 185. Earl and William also testified that they were well aware of the hospital's financial problems. N.T. 4/25/90 at 185; N.T. 4/24/90 at 168-169. In fact, William was hired as "special assistant"

in large part to manage the hospital's accounting department. N.T. 4/24/90 at 169.

The evidence showed that Earl and William were jointly responsible for several decisions that resulted in the conversion of hospital property to their own use or benefit or to the use or benefit of their family and friends. For example, according to Mark Richardson, the hospital's insurance agent, both Earl and William were responsible for the change in ownership and beneficiary of Earl Stout's life insurance policies from the hospital's name to the name of Earl Stout and his immediate family. N.T. 4/17/90 at 62-68, 125, 136. Both Earl and William testified that they jointly decided to pay Hillyard Jones a total of over $10,000 of hospital money between November of 1986 and May of 1988 simply because he was injured and unable to work. N.T. 4/24/90 at 135-136; N.T. 4/25/90 at 150. At William's direction and with Earl's knowledge, between March of 1987 and January of 1988, several JFK Hospital employees performed substantial maintenance and repair work on properties owned by William, Earl, and their respective friends and associates while on hospital time without the knowledge or approval of the hospital's board of directors. N.T. 4/11/80 at 133-146; N.T. 4/24/90 at 146-155; Gov't Exh 147. Edward Simkins, a union member and influential Stout supporter who received monthly checks for $500 from JFK Hospital between October of 1986 and February of 1987, testified that he "was in a little mist" as to why he was receiving money when he was doing no work for the hospital and after Earl had told him that he did not have a union job available for Simkins. N.T. 4/11/90 at 175-177. According to Simkins, when he questioned William Stout to find out

why he was receiving money from the hospital, William told him to "go see the old man," meaning Earl Stout. N.T. 4/11/90 at 177. Joyce McKay testified that she cut the paychecks to Simkins, Meyers, Brown, Lagocki, and Jones, and signed Earl Stout's name to the checks on behalf of the hospital upon William Stout's authorization. William Stout's initials appear in the bottom right-hand corner of each check request form for Simkins, Meyers, Brown, Lagocki, and Jones. N.T. 4/11/90 at 166-167, 172, 176, 177-178, 179, 181-182; Gov't Exhs. 16, 18, 10, 22, 24. There is evidence that William Stout knew that none of these individuals were performing services for the hospital, and yet, he arranged for money to be paid to them at his father's direction. *See infra* section II.C.2. The jury was entitled to conclude that the evidence supported the government's theory that Earl Stout and William Stout conspired to embezzle money and property from JFK Hospital and that the aforementioned incidents took place during the course of the conspiracy and in furtherance of its objectives.

B. Earl Stout's Motion for Arrest of Judgment

Stout moves for arrest of judgment pursuant to Fed.R.Crim.P. 34 as to counts one, three, four, and six through nine of the indictment on the ground that the language of these counts does not charge a criminal offense. His motion warrants little discussion.

These counts charge embezzlement, a violation of 18 U.S.C. §666(a)(1)(A). They charge that he acted knowingly and intentionally and track the language of the statute, a practice which the Supreme Court sanctioned

almost one hundred years ago. *See Ledbetter v. United States*, 170 U.S. 606 (1898). Since there is no infirmity in the language of the indictment, the motion must be denied.

Nonetheless, I will consider the reason Stout advances in support of his motion, that the government "treated" the statute as though it prohibited corporate waste, a civil but not criminal wrong. Stout contends that, at most, the government only showed that he had engaged in a wasteful expenditure of corporate funds, not a criminal act. He compares his prosecution with the prosecution of Joseph Morissette in 1949. Morissette took metal bomb casings from government land, believing they had been abandoned, and sold them for profit. He was charged with a knowing conversion of government property in violation of 18 U.S.C. §641. Despite Morissette's contention that he could not have had the requisite criminal intent to commit theft, the trial court instructed the jury that "[felonious intent] is presumed by [the defendant's] own act." *Morissette v. United States*, 342 U.S. 246, 249 (1952). The Supreme Court reversed the conviction on the trial court's failure to submit the question of intent to the jury: "That the removal of [the metal casings] was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property." *Id.* at 276 (emphasis in original).

Stout's case is nothing like Morissette's. Stout was charged with intentional and knowing embezzlement.[10] At trial, the government proved that he acted with the requisite criminal intent. *See supra* section II.A.2.,3. I explained to the jury several times throughout the charge that knowingly meant "on purpose," and that intentionally meant "that the act was committed with the intent to do something that the law forbids, that is with a bad purpose, to disobey or disregard the law." N.T. 5/2/90 at 38, 44, 48, 52, 61, 65. The jury was never directed to infer a felonious intent. Neither the indictment, the government's theory of prosecution, nor my instructions to the jury transformed the case into a civil action.

C. William Stout's Motion for Judgment of Acquittal

William Stout moves for judgment of acquittal on counts one, three, four, and six through ten on the ground that the evidence at trial was insufficient to sustain the convictions. As to count seven, in which William Stout

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[10] In each of the Section 666 counts, the Government charged that Earl Stout and William Stout

> did knowingly embezzle, steal, obtain by fraud, intentionally misapply, and without authority knowingly convert to their own use and the use of another person . . . who was not the rightful owner, and did aid and abet the embezzlement, theft, obtaining by fraud, misapplication and conversion of approximately $ ___, which was owned by and under the care, custody and control of JFK Hospital. . . .

and Earl Stout were convicted of directing the withdrawal of funds from JFK Hospital to pay Dr. Leichner's private medical malpractice insurance premiums, I will grant William Stout's motion for judgment of acquittal for the reasons I granted Earl Stout's motion as set forth in section II.A.1., *supra*. I will also grant William Stout's motion for judgment of acquittal as to count six, since the government failed to present evidence that William Stout acted with the requisite criminal intent. In section II.A.6, *supra*, I discussed the sufficiency of the government's evidence that a conspiracy existed between Earl Stout and William Stout to embezzle money from the hospital, and I will deny William Stout's motion for judgment of acquittal as to count one without further discussion. In all other respects, for the reasons set forth below, William Stout's motion for judgment of acquittal will be refused.

1. Count Six – The Trip to Ethiopia

William Stout maintains that "[t]he evidence fails to demonstrate that [he] willfully participated in any of the charged transactions with an intent to deprive the hospital of something he knew was improperly being delivered to him or others." Insofar as the trip to Ethiopia is concerned, I agree.

As discussed in section II.A.3, *supra*, the evidence showed that Earl Stout made a unilateral decision to donate $150,000 from the Health and Welfare Fund to buy grain for the famine victims in Ethiopia. He then provided funds from JFK Hospital accounts to pay expenses associated with a trip to Ethiopia and to promote the donation. Although the District Council 33 Executive

Board had voted "to do something" for the Ethiopian famine victims on behalf of the union, it never voted to provide the amount or type of relief which Stout ultimately directed, and it never voted to access the Health and Welfare Fund for this purpose. Neither the executive board nor the JFK Hospital Board ever considered whether the grain should be escorted to Ethiopia and whether hospital funds should be used to pay these additional expenses.

Nonetheless, the government presented no evidence from which a jury could conclude that William Stout knew that his father had not obtained proper authorization to make the grain donation and to finance the trip. William Stout's duties at the union concerned only the day-to-day affairs of the hospital. He had no affiliation with the District Council 33 Executive Board or with the JFK Hospital Board. He never attended any meetings of either board of directors and he had no authority with respect to the financial decisions of either entity. William Stout testified that it was his idea after discussing the matter with representatives from "Save the Children" for the union to donate grain to the famine victims and later to promote this good-will effort among other labor unions. According to his testimony, his father approached the executive board with the idea and received the board's approval to purchase the grain and to designate union employees to accompany the grain to Ethiopia. N.T. 4/24/90 at 99-101. Although in fact, Stout never received such approval, the government offered no evidence from which a jury could infer that William Stout knew his father acted without authorization. An admission by William Stout that he was his father's "right-hand

man" at the hospital and in charge of the hospital's accounting department does not support the conclusion that he was privy to or was an accomplice with respect to his father's misuse of $150,000 of non-hospital union funds. Nor does William Stout's title and responsibilities at the hospital imply that he would know either that no board of directors had sanctioned the use of hospital money to pay for the trip to Ethiopia or that his father had misinformed him about receiving board approval.

From the evidence, I must assume that William Stout believed that his father received permission from the executive board to purchase grain from "Save the Children" and to use hospital funds to ensure its safe passage. N.T. 4/24/90 at 164. Nevertheless, the government argues that "the trip [to Ethiopia] had nothing to do with the business of the hospital," and that "William Stout and his three companions travelled to Ethiopia as representatives of District Council 33, not as representatives of JFK Hospital," Gov't's Memorandum in Opposition to William Stout's Post-Trial motions at 9. Given the authority which William Stout exercised at the hospital and his control over the hospital's accounting department, the jury might have agreed with the government and could have decided that William Stout knew that the trip to Ethiopia and the promotional efforts were not "hospital-related." That, alone, however, is simply not enough on which to base a conviction, especially when one considers the nature and extent of the expenses incurred and William Stout's belief that the executive board had approved the trip.

The hospital paid the salaries of each of the four individuals who travelled to Ethiopia. Gov't Exh. 27A, C,

F, F. All but one of these individuals, Keith Gayle, worked for JFK Hospital and were already on its payroll. Keith Gayle worked for the dental lab affiliated with the Health and Welfare Plan. N.T. 4/6/90 at 65-69. Although "Save the Children" paid the coach class air fare for each traveller, JFK Hospital, at William Stout's direction, paid a total of $2000 to upgrade the four plane tickets to business class. The hospital also paid $471.00 after the trip was completed for photograph development charges and promotional fees. None of these expenses, except, perhaps, the ticket upgrades, were unusual or excessive in light of the nature and purpose of the trip. Keith Gayle was the only traveller whose salary JFK Hospital would not otherwise have paid if the trip had not taken place. The expenses, themselves, simply do not evidence an intent on the part of William Stout to deprive JFK Hospital of money which rightfully belonged to it "with a bad purpose to disobey or disregard the law."

William Stout's uncontroverted belief that both the donation and the trip were authorized by the executive board is very significant, if not dispositive, with respect to the question of his intent. There was evidence that in the past, JFK Hospital, in conjunction with the executive board, had sponsored non-hospital related events for underprivileged children in Philadelphia. N.T. 4/9/90 at 130; N.T. 4/24/90 at 96-98. The executive board was the highest authority in District Council 33. The government presented no evidence from which the jury could reasonably conclude that approval from the executive board without approval from the JFK board would, in William Stout's mind, render the use of hospital funds

"unauthorized" for purposes of 18 U.S.C. §666.[11] His motion for judgment of acquittal will therefore be granted as to count six.

2. Counts Three, Four, Eight, and Nine – The "Ghost" Employees

William Stout was convicted along with his father of embezzlement in violation of 18 U.S.C. §666(a)(1)(A) for directing the withdrawal of JFK Hospital funds without board authority to pay salaries to Stout supporters – Charles Meyers, William Brown, Richard Lagocki, and Hillyard Jones – to do no work. William Stout does not argue that the government failed to present evidence that these men performed no services in exchange for pay, that Earl Stout lacked authority to hire people to do nothing, or that Earl Stout concealed the payments from the hospital's board of directors. Indeed, as I discussed in section II.A.2, *supra*, there was ample evidence to support each of these elements of the government's case. William Stout's sole contention in support of his motion for judgment of acquittal as to the "ghost" employee counts is that the government failed to prove that William Stout

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[11] Count six charges William Stout with directing the use of JFK Hospital funds "without authorization from the *JFK Hospital Board of Directors*." (emphasis added). As discussed *infra* in section II.E.1., from the indictment and the evidence at trial, the jury could only conclude that the government prosecuted this case under the theory that "JFK Hospital Board authorization" could come from a variety of sources, including the District Council 33 Executive Board, which had the power to speak on behalf of any of the union boards.

knew that Meyers, Brown and Lagocki were not working and that he *knew* that his father did not have the power to confer corporate "beneficence" on Jones. Because I find that the government introduced circumstantial evidence from which the jury could infer knowledge on the part of William Stout, this contention is rejected.

By his own testimony, William Stout's knowledge of the hospital's administration and his own responsibilities there were extensive. He was specifically hired by his father to bring the hospital's accounting department "in-house" in order to save money. Until William Stout took over the accounting department, all of the hospital's financial services were handled by an outside management company. N.T. 4/24/90 at 67-68. William Stout became, in effect, the financial director of the hospital. Joyce McKay, the manager of the hospital's accounting department during William Stout's tenure and his immediate subordinate, testified that she wrote William's initials in the bottom right-hand corner of each check request form which corresponded to the paychecks issued to Meyers, Brown, Lagocki, and Jones to indicate that William had authorized her to issue the checks to these individuals. N.T. 4/10/90 at 167. McKay testified that these checks were handled separately from the hospital's "general payroll." At William Stout's direction, the money used to pay these purported "consultants" came from the hospital's general account as opposed to its payroll account. The payments were designated by a numerical code which translated to "administrative" expenses. N.T. 4/10/90 at 168, 173, 176, 180, 187. With respect to Lagocki, McKay explained that he was not designated as a consultant on the check request forms

which corresponded to his paychecks. Although William told her that Lagocki was to be a "consultant" to the hospital, she was directed to label his monthly check request forms by the same code used to refer to payments to the hospital's various suppliers. N.T. 4/10/90 at 177-178.

A reasonable jury could conclude from the evidence that William Stout was fully aware that Meyers, Brown, Lagocki, and Jones were receiving regular paychecks from the hospital and that he intended to keep their status concealed from the rest of the hospital administration. The jury was entitled to infer that William intended for these individuals to be accountable to him since he authorized their paychecks and their respective titles and dictated the specific accounts from which they would be paid. A reasonable jury could determine that William Stout was in a position to know whether the consultants he placed on the hospital's payroll at his father's request were performing any work.

William Stout admitted that one of his concerns when he was first hired was to ensure that the hospital received the outside consulting services for which it had contracted and for which it was paying. N.T. 4/24/90 at 169-170. At all times during his employment at JFK, he was concerned about the hospital's cash flow and wanted to make sure it got its "moneys' worth" for the bills it paid. N.T. 4/24/90 at 170. William Stout professed a good deal of knowledge with respect to the names, specific responsibilities, billing procedures, and payment of the six "legitimate" consultants who worked for the hospital. N.T. 4/24/90 at 127-130, 164-168, 170-171. According to his testimony, he met frequently with at least three of

these other consultants – Dick Testator, William Campbell, and Herbert Moss – to discuss the work they were doing, to monitor their productivity, or to negotiate a reasonable fee for their services. N.T. 4/24/90 at 130, 170-171. Not surprisingly, William was careful to limit the scope of his "concern" to exclude the "ghost" employees. He claimed ignorance regarding the duties of Meyers, Brown, Lagocki, and Jones, and he insisted that it was never his responsibility to monitor these "consultants" or to ensure that the hospital was getting its "moneys' worth" for their services. N.T. 4/24/90 at 138, 170. Apparently, William was simply "unaware" that, unlike the hospital's six legitimate consultants, Meyers, Brown, Lagocki, and Jones never produced a written or verbal report delineating the work he had accomplished and, also unlike the other legitimate consultants, none of them ever submitted a bill or an invoice for services rendered.

The jury was permitted to disbelieve William's self-serving line-drawing between those hospital consultants whose work he did oversee and with whom he did have regular contact and the "ghosts." Given that William freely admitted that he and his father decided to pay Hillyard Jones a salary with JFK Hospital money with the intention that Jones would perform no work in exchange for that salary, N.T. 4/24/90 at 135-136, the jury would have been justified in concluding that William knowingly placed other "ghosts" on the hospital payroll as well. From William's own testimony that one of his many functions at the hospital was to monitor the institution's cash flow, N.T. 4/24/90 at 168-170, that he and his father kept each other informed on a daily basis of their respective affairs at the hospital, N.T. 4/24/90 at 69, 176, and

that he monitored the fees and services of several of the hospital's legitimate consultants, the jury was entitled to infer not only that William Stout knew that his father hired the "ghosts" to do no work, but that he assisted his father in creating, concealing, and perpetuating these sham positions.

Finally, as to Hillyard Jones, William Stout makes the bold assertions that "the power to confer corporate beneficence would be within [Earl Stout's] authority, at least if not done for an anti-corporate purpose," and that "Earl Stout meant to benefit the membership generally by placing Jones on the payroll." William cites no support in the record for his understanding of Stout's authority and of Stout's intentions. The likely explanation for William's oversight is that there is no such authority. None of the hospital's by-laws or its Articles of Incorporation permit the hospital's president or executive director to dispense corporate funds at whim and without disclosure on the basis of some personal charitable inclination. Gov't Exhs. 11, 12A, 12B, 12C. Pennsylvania corporate law does not confer this power upon corporate CEO's in general, or upon any CEO in particular. There is no record in the minutes of any hospital board meeting at which a resolution giving Stout authority to confer corporate beneficence upon his own designees without board approval was ever discussed, much less confirmed. Gov't Exh. 13. Though Stout's actions no doubt enabled Jones to provide some basic necessities for his family, N.T. 4/11/90 at 207, 218, there was no evidence that the union's general membership, in particular, those experiencing financial difficulties of their own, benefitted from Stout's selective charity.

Alternatively, William Stout argues that the government failed to prove that he would have known that corporate charity of the type donated to Jones was beyond the authority of Earl Stout. In light of William's testimony concerning his responsibilities at the hospital, the close and interdependent business and personal relationship he shared with his father, his understanding of the hospital's administration and its corporate hierarchy, and his concern about the hospitals' cash-flow problems, the jury reasonably could have inferred that William Stout knew that his father had no authority to confer gifts of corporate money, masquerading as salary for a nonexistent job, without the knowledge of the hospital's board and with no discernable benefit to the hospital or to the union. William Stout's efforts to conceal the charitable purpose of the payments to Jones by labelling them generically as "administrative expenses" is further tangible evidence not only of his knowledge but of his complicity.

3. Counts Ten and Forty-Four – Earl Stout's Life Insurance

In count ten, William Stout was convicted of prepaying $87,782 in future premiums with hospital funds on two insurance policies on the life of Earl Stout in violation of 18 U.S.C. §666(a)(1)(A). In count forty-four, William Stout was convicted of mail fraud in connection with the same prepayment and also in connection with the transfer of ownership and change of beneficiary on the policies from the name of JFK Hospital to the name of Earl Stout and his immediate family. William does not

dispute that he was instrumental in ensuring that Stout's life insurance policies were completely prepaid with hospital money and that Stout became the sole owner of the policies the day before he lost his bid for re-election to the union's presidency in May of 1988. William argues only that the government failed to prove that he knew that the prepayment of Stout's life insurance premiums was beyond the scope of the authority he derived from his father and that the government never established that he knew that he was depriving the hospital of its proprietary interest in the two policies by signing the change in ownership/beneficiary form. Again, William professes ignorance when the evidence points directly to the contrary.

William Stout knew that one of the benefits his father legitimately received as president of District Council 33 was a life insurance policy paid for by the union worth twice his salary. N.T. 4/24/90 at 156. He also knew that his father received no such benefit as acting executive director of JFK Hospital. *Id.* There is nothing in either the hospital's Articles of Incorporation or in any of its bylaws which provides for life insurance for the executive director or for the president of the hospital. Gov't Exh. 11, 12A, 12B, 12C. The hospital's board of directors never voted to permit either Earl Stout or William Stout unilaterally to award life insurance benefits, much less *prepaid* life insurance benefits, to any of the hospital's officers or employees. Gov't Exh. 13. The government proved that Earl Stout lacked the authority to direct the prepayment of his life insurance premiums. It follows that William Stout, as his assistant at the hospital, also lacked that authority. It was within the jury's province to

discredit William Stout's assertion that he *believed* that he and his father had this authority.

At trial, I acquitted Earl Stout of all charges which named him as a participant in the unauthorized prepayment of his life insurance premiums, finding that there was no evidence that Stout knew that the prepayments had been made. The evidence showed that days before the date on which William Stout authorized the lump-sum prepayment, Earl Stout had rejected a suggestion by Mark Richardson, the union's insurance agent, that the hospital prepay the insurance premiums, stating that the hospital could not afford the expense. N.T. 4/17/90 at 51-52. The hospital's financial status did not suddenly improve in the days between the date that Earl Stout refused to approve the prepayment of premiums and the date that William Stout directed that the prepayment be made. The evidence strongly suggests that William Stout made the decision to prepay without Earl Stout's knowledge or permission, and contrary to Earl Stout's directives. Indeed, William Stout candidly admitted, upon questioning from his own attorney, that he decided to withdraw hospital funds to prepay his father's life insurance premiums simply because he felt that his father "was deserving of a prepaid insurance policy." N.T. 4/24/90 at 145. Hence, even assuming, *arguendo*, that William Stout genuinely believed that his father possessed the authority to prepay life insurance premiums with hospital funds, there was more than sufficient evidence from which the jury could have concluded that William Stout knew that he lacked the derivative authority to approve those prepayments but did so nonetheless.

On May 10, 1988, Earl Stout and William Stout signed a form provided to them by Mark Richardson changing to Earl Stout's name title to the two life insurance policies on the life of Earl Stout, which the hospital owned and for which the hospital had been paying premiums. Gov't Exh. 41, 41A. The same form also changed the named beneficiaries on the life insurance policies and effectively terminated the "split-dollar provision" which had previously guaranteed that the hospital, as the primary beneficiary on each policy, would recover the value of the premiums it had paid upon the death of the insured. By signing the change in ownership and beneficiary form, Earl Stout and William Stout eliminated the hospital's right to own the policies as well as its beneficial interest in the insurance proceeds without the knowledge or consent of the hospital's board of directors. The defendants thereby defrauded the hospital of $108,000, representing the cash surrender value of the two policies.

Mark Richardson testified at length at trial about the meaning of the "split-dollar provision" and about the effects that the change in ownership and beneficiary would have on the respective interests of the hospital, Earl Stout, and his named beneficiaries. N.T. 4/17/90 at 45-47, 62-68. Richardson testified that he explained to William Stout the consequences of the change in beneficiary and ownership:

> Basically, what I explained was that we are changing these forms in effect to change the ownership of the policy and the beneficiary. . . . What I explained to Billy in the process is that we are changing the ownership of the policy. The idea of changing the ownership, I further went on to explain, is that, in effect, if

> your new administration does come in office, then they can't terminate or change your policies at their will.

N.T. 4/17/90 at 67-68.

The defendant emphasizes the fact that Richardson also testified that he did not *specifically* inform William Stout that by signing the change in ownership and beneficiary form, which listed Earl Stout as the new owner of the policies and Eloise Stout, William Stout, and Erlene Stout as the sole beneficiaries, he was, in effect, terminating the split-dollar provision. N.T. 4/17/90 at 115. The language "split-dollar provisions are hereby terminated" was typed onto the change in ownership and beneficiary form *after* Earl Stout and William Stout had signed the form. N.T. 4/17/90 at 113-114, 115. Nonetheless, even absent that clarification, the elimination of the hospital as a named beneficiary was accomplished when the defendants signed the form. N.T. 4/17/90 at 150-51. The jury was free to discredit the defendants' testimony that they were unaware that their actions on the eve of Stout's election defeat would prevent the hospital from recovering the value of the premiums it had paid to date. In any event, regardless of whether William Stout misunderstood the effect that his conduct would have on the hospital's ability to collect proceeds upon the death of the insured, he never denied that he intended to transfer *ownership* of the insurance policy – which is clearly something of value – from its rightful owner, the hospital, to Earl Stout, without permission from or disclosure to the hospital's board of directors. The evidence supported the jury's finding that William Stout intended to deprive JFK

Hospital of its property. On that basis, the convictions on counts ten and forty-four must stand.

D. Cynthia Bullock's Motion for Judgment of Acquittal

Cynthia Bullock moves for judgment of acquittal of her mail fraud conviction on the alleged failure of the government's proof at trial. Bullock contends that there was insufficient evidence at the close of the government's case for me to have denied her Fed.R.Crim.Pro. 29(a) motion. She claims that the government failed to present evidence that she did not perform any services for the Legal Services Plan between 1985 and 1988, that she intended to defraud the union and the Legal Services Plan, that the alleged mailings were in furtherance of the execution of the mail fraud scheme, and that the checks which were the subject of the mail fraud counts were placed in the United States mail.

As an initial matter, I note that Bullock presented evidence to the jury after I denied her Rule 29 motion. *See* N.T. 4/25/90 at 20-29; 31 (testimony of Stanley Rubin on behalf of Cynthia Bullock); N.T. 4/25/90 at 32-34 (Stipulation of Facts read to jury on behalf of Cynthia Bullock). It is well-settled that by introducing evidence on her own behalf, a defendant waives the right to object to the denial of her motion for judgment of acquittal pursuant to Rule 29(a). *United States v. Calderon*, 348 U.S. 160, 164 n.1 (1954); *United States v. Trotter*, 529 F.2d 806, 809 n.3 (3d Cir. 1976). At this stage, the entire record is examined only to determine whether it contains *some* evidence from which the jury could have found all of the elements of the

crime charged beyond a reasonable doubt. *See United States v. Cooper*, 567 F.2d 252, 254 (3d Cir. 1977). With that in mind, I find that the evidence at trial was sufficient to sustain Bullock's conviction, and I will therefore deny her motion for judgment of acquittal.

The mail fraud counts of which Bullock was convicted, counts twelve through twenty-two, concern payments totalling over $6,000 mailed on her behalf by the Legal Services Fund at Earl Stout's direction between November of 1985 and April of 1988. These payments were made in furtherance of a scheme by Stout and Bullock to defraud the Legal Services Fund and District Council 33 of money and property worth over $190,000 between March of 1985 and May of 1988. As discussed in section II.A.4., *supra*, Jacqueline Green, who replaced Bullock in March of 1985 as director of the Legal Services Plan, testified that to her knowledge, Bullock performed no services for the plan after August of 1985. Green stated that she never saw Bullock at the office of the Legal Services Plan, that she never utilized Bullock's so-called "consulting" services, and that she never observed Bullock "consulting" with anyone at the plan. N.T. 4/19/90 at 9, 18-21. Al Johnson, who, as secretary-treasurer of District Council 33 and of the Legal Services Plan, was responsible for the plan's finances, N.T. 4/5/90 at 129, testified that he was aware of no services which Bullock performed for the plan after Green was hired in March of 1985. N.T. 4/9/90 at 70. Other than the testimony of Earl Stout, there was no evidence that Bullock did any work for the Legal Services Plan during the time period covered by the mail fraud counts. It was within the jury's province to discredit Stout's testimony and to

credit the testimony of Green and Johnson. The jury could properly have inferred that if Bullock were providing any consulting services for the Legal Services Plan, Johnson would have been informed of this arrangement and Green, as director of the plan, would have been encouraged to take advantage of those services. The testimony of Green and Johnson provides a sufficient basis for the jury's conclusion that Bullock performed no services at all for the Legal Services Plan in exchange for the payments described in counts twelve through twenty-two.

For a defendant to be convicted of mail fraud, the evidence must show that the defendant had knowledge of the fraudulent nature of the scheme and willfully participated in it with the intent that its elicit objectives be achieved. In the absence of direct evidence, however, the requisite knowledge and intent can be demonstrated circumstantially. *United States v. Pearlstein*, 576 F.2d 531, 541 (3d Cir. 1978). In this case, the government presented sufficient circumstantial evidence for the jury properly to infer guilty knowledge and fraudulent intent.

Stout testified that after he fired Bullock as director of the Legal Services Plan, he wanted "to make amends and to try to make sure that she comes out all right." N.T. 4/25/90 at 124. He said that he therefore told her to "set herself up in business to be a consultant." N.T. 4/25/90 at 124-125. Green testified that in April of 1985, Stout instructed her to remove Bullock's name from the regular payroll and to "put her on as a consultant." N.T. 4/19/90 at 19. Stanley Rubin, Bullock's accountant, testified that Bullock applied for and received a business license to be a consultant soon after her termination. He also testified

that Bullock listed her occupation as "consultant" on her income tax returns for the years 1985 through 1988. N.T. 4/25/90 at 22-28; Dft. Exhs. 307-310. Nonetheless, Bullock listed not a single expense in connection with her so-called consulting business on any of the four annual tax returns she entered into evidence. N.T. 4/29/90 at 30; Dft. Exhs. 307-310. The "consulting services" which Stout said that Bullock performed – handling the concerns of the union membership and keeping him informed about the plan's business, N.T. 4/25/90 at 125-26, – were services which Green was required to perform and did perform as director of the plan. N.T. 4/19/90 at 8. The jury was entitled to infer that Bullock never performed consulting services to the plan, never intended to perform consulting services to the plan, and that the label "consultant" was simply a sham which she and Stout created as an attempt to make illicit income appear legitimate.

When Bullock served as director of the Legal Services Plan, her duties included supervising the employees who worked for the plan, preparing the plan's financial reports, administering its funds, and reporting to the board of trustees at their monthly meetings concerning the status and progress of the plan. N.T. 4/6/90 at 79-81. In March of 1985, Bullock was made aware that Green had been hired as her replacement. N.T. 4/19/90 at 15-16. The evidence showed that even after it was clear that Bullock would not be returning to her former position, she retained the car which belonged to the plan for her personal use and caused the bills she incurred, such as automobile insurance, repairs, and Pennsylvania motor vehicle registration, to be forwarded to the plan for payment. Gov't Exhs. 53-59, 61-63; N.T. 4/19/90 at 27-33. The

car was purchased and given to Bullock in January of 1985, two months *after* she was fired. Gov't Exh. 53. The evidence also showed that in addition to her $48,000 annual salary, at Stout's direction, the plan continued to pay Bullock's health insurance and deferred compensation after her discharge. Gov't Exhs. 49-52, 60, 64; N.T. 4/19/90 at 36-38. The jury could properly have inferred from Bullock's previous position of responsibility and from her experience working with Stout and with the plan's board of trustees that she knew that Stout had no authority to tap Legal Services Fund accounts to pay her a substantial salary and benefits and to provide her with a car when someone else had been hired to do the job she previously held and when she was providing nothing of value to the plan. The jury was justified in concluding that Bullock knew that the money and benefits she received did not rightfully belong to her.

According to Al Johnson and Frances Rooney, Stout never informed the Legal Services Board of Trustees that Bullock was receiving money and benefits from the plan after her termination. N.T. 4/9/90 at 59; 4/23/90 at 130. Apparently, only Stout, Bullock, and Green knew that Bullock was being paid as a "consultant" when, in fact, she did no consulting. The jury reasonably could have inferred that Bullock knew that the board of trustees was unaware of her illicit financial arrangement with the plan. Although Bullock held no position of power within either the union or the plan at the time of the fraudulent scheme which would have enabled her to orchestrate and direct it, the evidence supported the inference that she knowingly and intentionally carried out the scheme's objectives by masquerading as a consultant, by receiving and

utilizing money and property which belonged to the plan, and by providing nothing of value to the plan in return for payments to her. The jury's finding that Bullock possessed the requisite intent to defraud the Legal Services Plan and District Council 33 of money and property will not be disturbed.

Bullock argues that the payments set forth in counts twelve and thirteen (payments to Blue Cross for Bullock's health insurance) and in counts seventeen through twenty-two (payments to Pacific Fidelity Life Insurance Company for Cynthia Bullock's deferred compensation plan) were not made in furtherance of the scheme to defraud because they were done "as a courtesy to Ms. Bullock." Similarly, Bullock asserts that the payments described in counts fourteen (car insurance), and fifteen, and sixteen (car repairs) were unrelated to the scheme because the car and the insurance were "in the Legal Service Plan's name for the purpose of benefitting the Legal Services Plan not Cynthia Bullock." Although Bullock cites no legal authority in support of her argument, I assume that she is relying on the standard announced in *United States v. Tarnopol*, 561 F.2d 466 (3d Cir. 1977). In *Tarnopol*, the Third Circuit held that in order to determine whether a mailing is to be deemed "for the purpose of executing" a scheme to defraud within the meaning of the mail fraud statute, "the question is whether or not the 'mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute.' " 561 F.2d at 471-72 (quoting *United States v. Maze*, 414 U.S. 395, 399 (1974)). " '[T]he close relation of the mailings to the scheme does not turn on time or space, but on the dependence in some way of the completion of the scheme or the

prevention of its detection on the mailings in question.' " *Id.* at 472 (quoting *United States v. LaFerriere*, 546 F.2d 182, 187 (5th Cir. 1977)). "Routine mailings" which are required and uniformly made according to law or pursuant to a standard business procedure will not support a mail fraud conviction if adhering to the procedure "was itself intrinsically devoid of any element of fraud." *Id.* Whether a mailing was made "as a courtesy to Ms. Bullock" or according to a standard practice of the Legal Services Plan does not end the inquiry, however. "[I]f the mailing is a part of executing the fraud, or is closely related to the scheme, a mail fraud charge will lie even though the mailing was also related to a business purpose." *United States v. Brown*, 583 F.2d 659, 668 (3d Cir. 1978), *cert. denied sub. nom., Greenblatt v. United States*, 440 U.S. 909 (1979).

In this case, the evidence supported the jury's finding that all of the mailings at issue were closely related to the mail fraud scheme and thus were made in furtherance of its objectives. The object of the scheme was to secure financial benefits for Bullock from the Legal Services Fund to which she would not otherwise have been entitled without the knowledge or consent of the fund's board of trustees. The mailings financed these benefits, and thus were integral to the scheme's success. The "completion" of the scheme depended entirely on the mailings in question.

This is not a case where the mailings constituted routine business procedures which were arguably incidental to the scheme to defraud, as in *Tarnopol* and *Brown*. Although Green may have paid the health insurance for employees of the plan who legitimately appeared on its

payroll and who performed services in exchange for salary and benefits, the Legal Services Plan had no "routine practice" of paying benefits to people who did no work for the plan. In fact, according to Green's testimony, the benefits which Bullock received were not common to the Legal Services Plan employees. Bullock was the only individual on the payroll who was permitted to choose her own health insurance carrier. No one else on the payroll had Blue Cross health insurance by virtue of his affiliation with the Legal Services Plan. N.T. 4/19/90 at 63. Bullock was the only individual on the payroll to enjoy the personal use of a car owned, insured, and maintained by the plan. N.T. 4/19/90 at 35-36. She was also the only individual on the payroll with a deferred compensation plan. N.T. 4/19/90 at 58. By law, salary may only be tax-deferred if one is legitimately employed and if contributions are made by the employer on the employee's behalf. Bullock was aware of this restriction. N.T. 4/19/90 at 40. If payments were mailed to Blue Cross, A. Margolis, Inc., Fierstein Olds, and Pacific Fidelity on Bullock's behalf as "courtesies" to her, then they were fraudulent courtesies, because the evidence clearly showed that Bullock was not entitled to benefits paid by the plan and would not have received benefits paid by the plan but for her fraud.

The fact that the Legal Services Plan owned the car which Bullock appropriated hardly leads to the conclusion that payments mailed to insure and repair it were not "in furtherance of" the mail fraud scheme. Regardless of who or what retained title to the car, according to the evidence, Bullock treated the car as her own. Her initials and a gold heart were painted on each door. N.T. 4/19/90 at 34-35. The car was never made available to the staff at

the Legal Services Plan during the time it was in Bullock's possession. N.T. 4/19/90 at 35. The insurance and repair payments certainly benefitted Bullock, for without these payments, she would have been unable to drive the car. Any benefit which the Legal Services Plan derived from these payments was negligible at best. It makes little economic sense for a corporation to pay insurance premiums and repair bills for a car it owns, but which none of its agents or employees is able to use. The jury could properly have inferred that title to the car remained in the name of the Legal Services Plan to perpetuate the fraud – to conceal the fact that Bullock was the intended beneficiary of a car for which the plan had paid. The mailings containing payments for car insurance premiums and repair costs were thus unquestionably "in furtherance of" and "for the purpose of executing" the scheme to defraud.

Finally, Bullock argues that the government failed to satisfy its burden of proof that the payments described in counts one through twenty-two were transmitted through the United States mail as required by 18 U.S.C. §1341. The Third Circuit's recent decision in *United States v. Burks*, 867 F.2d 795 (3d Cir. 1989), is controlling on this issue. In *Burks*, defendant Charles Burks, M.D., was charged and convicted of one count of mail fraud in violation of section 1341. The government presented evidence that Burks participated in a scheme to defraud insurance companies by providing fraudulent medical bills and reports to an attorney, Donell Reed, who then submitted the bills to various insurance companies for payment. On appeal, Burks argued that the government presented insufficient

evidence that the reports and bills in question were transmitted via United States mail as opposed to a private courier. The Third Circuit agreed. In reversing Burks' conviction, the court found that although the government presented circumstantial evidence concerning Reed's standard business practice and the insurance company's usual experience of receiving medical reports through the mail, "[n]o evidence was presented concerning the Reed correspondence specifically." *Id.* at 797. "Although circumstantial evidence may be used to prove the element of mailing essential to convict under §1341, reliance upon inferences drawn from evidence of standard business practice without specific reference to the mailing in question is insufficient." *Id.* In the government's case-in-chief, it presented sufficient evidence through the testimony of Jacqueline Green that the payments on behalf of Bullock to Blue Cross, to Pacific Fidelity, to Fierstein Olds, and to A. Margolis, Inc., were sent through the United States mails, thereby providing the missing link which necessitated a reversal in *Burks*.

During direct examination, Green testified that she placed the checks for payment of Bullock's deferred compensation, health insurance, automobile insurance, and automobile repairs in first class United States mail. N.T. 4/19/90 at 30-32, 37, 38. Later, on cross-examination, Green clarified her testimony. She described the general procedure at the Legal Services Plan for sending business correspondence. She explained that after she wrote a check on behalf of the Legal Services Plan, she would put the check in an envelope bearing the appropriate address, and would place the envelope in the "out" basket on her desk. N.T. 4/19/90 at 52. The office courier, Hershell

Mitchell, would collect the envelopes from Green's "out" basket, seal them, and run them through the office's postal meter machine. Mitchell would then deliver the checks to the 30th Street United States Post Office in Philadelphia at approximately 4:30 p.m. If it was necessary to deposit mail after 4:30 p.m., Green testified that she would do so. N.T. 4/19/90 at 75. Green stated that she never sought to have the checks for Cynthia Bullock's health insurance, car insurance, or deferred compensation hand-delivered. N.T. 4/19/90 at 74. Although Green did not see the letters after Mitchell removed them from her "out" basket unless she was required to deliver them to the post office personally, N.T. 4/19/90 at 80, she testified that it was standard office procedure for the particular checks at issue to be mailed. N.T. 4/19/90 at 76. Green distinguished these checks from those checks which she specifically arranged to be hand-delivered by office courier, such as Bullock's paychecks, N.T. 4/19/90 at 13-14, and the first of Judge Williams' paychecks. N.T. 4/19/90 at 48.

Because Green could not recall specifically which checks Mitchell collected and mailed and which checks she personally mailed from the hundreds of checks processed by the Legal Services Plan during her employment, she testified that she could not state "that any specific check was mailed." N.T. 4/19/90 at 53. Nonetheless, the mail fraud statute does not require that the government present direct testimony which essentially carries each mail fraud item to the postmaster's hands. As the Third Circuit reiterated in *Burks*, proof of the use of the mails can be circumstantial, including proof as to the specific mailings at issue. 867 F.2d at 797. So long as

the government has proven "clearly and explicitly" that a mailing occurred, a mail fraud conviction will be upheld. *Id.* at 798. In this case, Green's testimony concerning the standard office procedure at the Legal Services Plan for the transmittal of checks, as well as her testimony concerning the applicability of that office procedure to the particular checks at issue, provided sufficient direct and circumstantial evidence from which a reasonable jury could conclude that the requisite mailings occurred beyond a reasonable doubt. I conclude that the government has proven "clearly and explicitly" that the checks listed in counts one through twenty-two were mailed by first class United States mail.

E. Earl Stout's and William Stout's Motion for a New Trial

Earl Stout and William Stout seek a new trial primarily on the basis of my instructions to the jury concerning the concepts of "authority" and "fiduciary duty" as these terms applied to the defendants' prosecution. Earl Stout claims that my charge permitted the jury to convict him solely on the finding that he lacked authorization to make the expenditures charged in the indictment without consideration of his intent. He also contends that I failed to distinguish between the varying degrees of authority Stout possessed within the District Council 33 Executive Board, the Legal Services Board of Trustees, and the JFK Hospital Board of Directors. Stout alleges that it was error to introduce the concept of fiduciary duty when I charged the jury on mail fraud and RICO because

fiduciary duty is unrelated to those criminal offenses.[12] Finally, Stout finds fault with my "ostrich" instruction, whereby I instructed the jury that it could infer knowledge from willful blindness to an obvious impropriety.[13] William Stout alleges a variety of instructional errors, most of which appear to be related to my charge on authority and fiduciary duty in the context of the embezzlement counts and on the requisite knowledge required for a conviction to stand.[14] For the reasons that follow, the Stouts' motions will be refused.[15]

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[12] In fact, the fiduciary duty instruction was delivered in the context of the embezzlement counts. N.T. 5/2/90 at 47-48. Fiduciary duty was mentioned only briefly in the mail fraud instruction, N.T. 5/2/90 at 67, and not at all in the RICO instruction.

[13] On May 11, 1990, Earl Stout submitted an omnibus post-trial motion. Because it was without case citations, developed arguments, and page references to the record, by order dated May 17, 1990, I refused to consider that motion. Stout was directed to file another motion and was granted additional time in which to do so. It is his second memorandum to which I refer in this opinion, albeit that there is still a dearth of case citations and no page references to the record. Nonetheless, I will address his claims and contentions as I understand them.

[14] William Stout's memorandum lacks the legal support, specificity, and references to the record required by my May 4, 1990, order. Nonetheless, in an effort to make my position clear for purposes of appeal, I will attempt to address those contentions which can be gleaned from defendant's rather confusing discourse. To the extent there are objections buried therein which I am unable to decipher, they are refused.

[15] Because my instructions to the jury on authority, fiduciary duty, knowledge, and intent implicated the charges against

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1. Earl Stout's Authority

In counts three through ten the defendants were charged with embezzlement, withdrawing funds from JFK Hospital "without authorization from the Board of Directors of JFK Hospital" in violation of 18 U.S.C. §666(a)(1)(A). In counts twelve through forty-three, the defendants were charged with making payments on behalf of Cynthia Bullock and to Judge Williams "without the authorization of the Board of Trustees of the Legal Services Fund" in violation of the mail fraud statute, 18 U.S.C. §1341.[16] The conspiracy counts alleged a conspiracy to violate 18 U.S.C. §666(a)(1)(A), *i.e.*, a conspiracy to embezzle funds from JFK Hospital without authorization from its board of directors. The RICO count was premised on the mail fraud violations charged in counts twelve through forty-three and thus, like the mail fraud counts, was predicated on the theory that a taking without authority can constitute fraud. Hence, the government's indictment, its proof at trial, and its arguments to the jury focused primarily on the scope of Stout's authority within the union and the extent of his authority to spend the union's money. The concept of "authority" was the heart

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both Earl Stout and William Stout, and because the objections they raise to those instructions tend to overlap, I have decided to address their motions for a new trial together.

[16] William Stout was charged only in count forty-three. Earl Stout was charged in counts twelve through forty-three. Cynthia Bullock was charged in counts twelve through twenty-two.

of the government's case-in-chief and was also the focus of the defenses raised by the accused.

It is well-settled that an agent is not immune from criminal liability simply because his principal authorizes his conduct. *See United States v. Floyd*, 882 F.2d 235, 240 (7th Cir. 1989). Thus, authorization which is improperly or fraudulently obtained is treated as a lack of authorization. *United States v. Dixon*, 609 F.2d 827, 829 n.3 (5th Cir. 1980).[17] The principal's knowledge, ratification or consent is therefore not a *per se* defense, but instead may be introduced by the accused as evidence that he did not act with requisite intent. *United States v. Cauble*, 706 F.2d 1322, 1353 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). The defendants maintained and sought to prove throughout trial that the various District Council 33 boards, including the JFK Hospital Board had, at one time or another, given Stout "blanket" authority to hire and fire personnel and to spend the union's money as he deemed appropriate. I therefore informed counsel during the Rule 30 charge conference that I intended to instruct the jury that regardless of the extent of Stout's purported authority within JFK Hospital, its board of directors could not grant him "blanket" authority, either explicitly or implicitly, to transfer funds in a manner inconsistent with the hospital's or the union's stated purposes, as reflected in the hospital's and the union's governing documents. The board also could not grant Stout the authority to spend the hospital's money in violation of his fiduciary duty to the union members. *Id.* (" 'The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or willful misapplication of the funds of the bank.' ") (quoting *United States v.*

Breese, 173 F. 402, 410 (C.C.W.D. N.C. 1909). I further informed counsel that I planned to distinguish between authority which the board had the power to confer and authority which it had no power to confer or which had been improperly or fraudulently obtained by using the terms "valid" versus "invalid" authority.[18]

Defendants can hardly claim that they were surprised by my explanation to the jury of "authorization" as that term is used in the indictment and in 18 U.S.C. §666. My definition was consistent with the case law applying other federal statutes which impose criminal

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[17] There was evidence at trial that Stout refused to hear motions designed to curb or delineate the scope of his authority and occasionally adjourned board meetings prematurely when his authority was challenged. N.T. 4/9/90 at 144-146; N.T. 4/17/90 at 180-188; 4/18/90 at 107-108. As discussed in section II.A.2.-II.A.4., *supra*, there was also evidence that Stout concealed substantial expenditures of union funds from the union boards. To the extent that Stout acted under the assumption of authority either because he refused to concede power when requested to do so or because he concealed financial decisions which would not otherwise have been approved, Stout acted under "authorization improperly or fraudulently obtained," that is, without authorization.

[18] The genesis of my decision to differentiate between "authority" and "valid authority" came from a "Summary of Supplemental Points" (document no. 25) submitted by counsel for William Stout during the Rule 30 conference. Under the heading, "Board cannot grant authority to steal corporate funds," he requested that I "4. Distinguish takings that would be thefts but for authorization – avoidance of circularity of reasoning i.e., distinguishing authorized takings that are nonetheless thefts from takings that would be thefts but for the fact that they were authorized." That is exactly what I did by distinguishing between "authority" and "valid authority."

liability on an agent in constructive possession of money for misapplying or expending that money without authorization from his principal. *E.g., Floyd,* 882 F.2d 235 (applying 29 U.S.C. §501(c)); *Stockton,* 788 F.2d 210 (4th Cir.) (same), *cert. denied,* 479 U.S. 840 (1986); *United States v. Beran,* 546 F.2d 1316 (8th Cir.) (applying 18 U.S.C. §656), *cert. denied,* 430 U.S. 916 (1977). Counsel and I discussed those cases during the Rule 30 conference and the applicability of their holdings to the section 666 counts and to the facts of this case.

William Stout maintains that my instruction discussing the various sources and limitations to Earl Stout's authority to spend hospital funds, N.T. 5/2/90 at 40-48, "had nothing to do with the charges in this case that the government was required to prove that the Board of Directors had not authorized the expenditures." William Stout's Memorandum in Support of Post-Trial Motion at 23. He further maintains that: "[t]he effect of these instructions as to which proper exception was taken was to riddle authority with so many exceptions, based on hypertechnical notions of deviation from proper procedure, that the government's burden was effectively removed and shifted to the defendant to prove 'valid' authority." *Id.* at 24. William Stout appears to be raising three separate arguments here: that my explanation of the potential sources of and limitations to Stout's authority were overbroad; that I shifted the burden of proof to the defendants to prove valid authority; and that I instructed the jury that it could find an absence of authorization on the basis of insubstantial deviations from accepted procedure. All of these arguments lack merit, and, not

surprisingly, none of them are supported by legal authority or citations to the record.

William's objection to my list of sources for valid authority is belied by his supplemental points for charge and by his description of the defense's position during the charging conference. Indeed, William Stout requested a specific instruction from me as to the "non-exclusivity of board authorization." He asked that I instruct the jury that "actual authority may be expressly conferred by the Board, or it may be done by implication, or it may be done through the articles of incorporation." William Stout's Supplemental Points for Charge at 4-5. At the Rule 30 conference, counsel for William Stout conceded that virtually all of Stout's expenditures were made without the knowledge of the hospital's board of directors, but that it was "the defense's position that authorization for these acts came by way of the by-laws, courses of conduct, interpretations of the Articles of Incorporation, and so forth." N.T. 4/30/90 at 74, 78-81. William Stout received an instruction similar to the one he requested – one which effectively increased the government's burden of proving absence of valid authorization by increasing the potential sources of hospital board authorization well beyond a vote of its members. He can hardly claim that he was prejudiced by an instruction which mirrored one he submitted and which made the government's case more difficult to prove.[19]

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[19] When Congress drafted 18 U.S.C. §666, it failed to define the term "without authority" as it appears in subsection

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There is no support in the record for William Stout's claim that my charge improperly shifted the burden of proof to defendants. On at least four occasions throughout my charge on the section 666 counts, I specifically instructed the jury that it was the government's burden to prove beyond a reasonable doubt that Earl Stout did not have valid authority to make the expenditures in question. N.T. 5/2/90 at 37, 38, 44, 52. My final words to the jury at the conclusion of the instructions on the section 666 counts were as follows:

> With regard to each of the defendants, you should remember that the law never imposes any obligation on a defendant to prove anything or establish any fact. To the contrary, the burden

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(a)(1)(A). One can only conclude that Congress intended for "authority" to be fact-specific. The potential sources of board authority which I described to the jury were gleaned from the indictment, the evidence presented at trial, and from the arguments of counsel. Although defendants were charged in counts three through eleven of the indictment with acting "without authorization from the Board of Directors of JFK Hospital," the documents which governed the hospital board and the union as a whole were listed in paragraphs one through thirteen of count one and incorporated by reference into each successive count. On the first day of trial, these governing documents were entered into evidence through the testimony of Al Johnson. The evidence showed – and the defendants vigorously argued – that Earl Stout's expenditures could be "with hospital board authorization" even absent a formal vote of the board's members if his conduct was consistent with any one of the various hospital or union governing documents. Thus, William Stout is incorrect that I "amended" the indictment by charging the jury that it could look to the governing documents as potential sources of or limits to Stout's authority.

> remains upon the government to prove the facts and the required criminal intent.

N.T. 5/2/90 at 54-55. My instructions were direct and unambiguous; there was no room for doubt as to which party had the burden of proof in this case.

William Stout's argument that I permitted the jury to find an absence of authority based on "hypertechnical notions of deviations from proper procedure" is likewise without support in the record. Consistent with the evidence presented during trial and the defendant's insistence that Stout's authority to spend hospital funds could come from a variety of sources, I instructed the jury that authorization could be granted *or* precluded in a number of ways, and offered general examples from the evidence and from hypotheticals which the average juror would understand. N.T. 5/2/90 at 40-48. My hypotheticals concerned drastic, not hypertechnical deviations. Apparently, it is the latter term, "precluded," which defendant finds objectionable. Nonetheless, there is no legal requirement that I tailor my charge to the defenses presented by an accused. My charge fairly informed the jury that just as board authority could be granted by certain documents or formalities, it could also be denied by those same documents or formalities. I never charged the jury that minor deviations from procedure either would or would not constitute a lack of authorization; to the contrary, I informed the members of the jury that they were "to determine the scope of Earl Stout's authority and whether he knowingly and intentionally exceeded that authority with regard to payments from JFK funds." N.T. 5/2/90 at 48. The boundaries of Stout's authority and whether he acted within those boundaries were at all times issues of

fact for the jury to decide based on the evidence presented at trial.

Similarly, Stout is incorrect that my charge created a "spillover" in the minds of the jury regarding the "quarrels in the District Council 33 Executive Board over the extent of Earl Stout's authority . . . into the undoubted authority he had with respect to the Legal Services Board and JFK Hospital." First, Stout never requested a charge which distinguished among the various boards of directors and trustees within the union and the union and the extent of authority of limits to authority each board had given to Stout. As I explained to counsel after I charged the jury, this was argument properly reversed for counsel's closing. N.T. 5/2/90 at 107-108. Second, after reviewing the portion of the charge which Stout finds objectionable, I conclude that, in fact, the instructions served to distinguish rather than to blend the various entities and governing documents which provided the sources of Stout's authority. I reminded the members of the jury that they had "heard a great deal of testimony concerning Earl Stout's authority with respect to District Council 33's Executive Board, the Legal Services Fund, the Health and Welfare Fund, and JFK Hospital." N.T. 5/2/90 at 46. I noted that they had also heard read into the record "minutes from various board meetings . . . . portions of the AFSCME International Constitution, the AFSCME Financial Services Code, the District Council 33 Constitution, the Legal Services fund Declaration of Trust, the JFK Articles of Incorporation and various JFK Hospital bylaws. . . . " *Id.* I then instructed them that they "may reject some, all, or none of this evidence as [they] s[aw] fit to determine the boundaries of Earl Stout's

authority over the various entities of District Council 33." N.T. 5/2/90 at 47. This instruction was factually and legally correct and did not prejudice Earl or William Stout in any way.

2. Knowledge and Intent

The defendants allege that I failed to instruct the jury as to the relationship required among knowledge, intent, and authorization before a conviction could lie under 18 U.S.C. §666(a)(1)(A). They maintain that my charge allowed the jury to convict solely upon a finding of invalid authorization or lack of authorization without a concurrent finding of criminal intent. They are wrong.[20] Initially, I note that counsel all agreed to adopt the government's proposed jury instruction number 24, defining knowledge and intent. N.T. 4/30/90 at 11. That is essentially the same instruction I gave to the jury throughout the charge. N.T. 5/2/90 at 37-38, 44, 61, 86, 87, 88. I also made it abundantly clear to the jury that it was the government's burden to prove beyond a reasonable doubt *each* of the elements of embezzlement pursuant to section 666(a)(1)(A), including lack of valid authority and knowledge and intent. N.T. 5/2/90 at 33-34, 37, 44, 52.

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[20] Under the caption "Other Instruction Errors," William Stout claims that "the court erred in: . . . (c) conspiracy must have the same intent as the substantive offenses." As written, defendant's claim makes no sense. Assuming that defendant is trying to allege that I failed to charge the jury on the degree of knowledge and intent which the government must prove to convict the defendants of count one, his assertion of error is contradicted by the record. N.T. 5/2/90 at 57, 59, 61, 63-64, 65.

I defined the terms "without authority" and "knowingly and intentionally" separately to avoid confusing the jury and to emphasize that each term was a different element of the offense charged. I then explained the relationship between these terms: "It will be matter for you [the jury] to decide . . . whether he [Earl Stout] knowingly and intentionally exceeded that authority with regard to the funds that are referred to in count 3 through 11." N.T. 5/2/90 at 48. As requested by defendants, I informed the jury that Stout believed "he was authorized to make these expenditures because he thought they were in the best interest of JFK Hospital and its owner, the membership of District Council 33." N.T. 5/2/90 at 52. I further explained that "Earl Stout denies that any of these expenditures were made with a specific intent to do something that the law forbids or with a bad purpose to disobey or disregard the law. *Unless the government has proven beyond a reasonable doubt that Earl Stout did not have valid authority to make the expenditures in question, and has also proved beyond a reasonable doubt that he acted knowingly and intentionally, he cannot be found guilty of embezzlement on any of the counts 3 through 11." Id.* (emphasis added). Thus, defendants' assertion that my charge lacked an instruction regarding the requisite "nexus" between knowledge, intent, and authority which must exist before criminal liability can attach is simply incorrect. Even a strained reading of my charge would have led the jury to return a verdict of "not guilty" if a finding of invalid authorization were not accompanied by a concurrent finding of knowledge and criminal intent.[21]

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[21] Significantly, the jury found defendant Frances Rooney not guilty of embezzlement and conspiracy to commit

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3. Earl Stout's Fiduciary Duty

Defendants maintain that my instructions concerning fiduciary duty, N.T. 5/2/90 at 47-48, 67, were inapplicable to the charges against them and enabled the government to meet its burden of proof in the embezzlement counts merely by proving that Stout breached his fiduciary duty to the union members. The defendants misconstrue my charge as well as the relevant case law.

Earl Stout's fiduciary duty to District Council 33 was certainly relevant to both the embezzlement and the mail fraud counts. In paragraph sixteen of count one of the indictment, incorporated by reference into each successive count, the government alleged and described Stout's fiduciary duty to the entities associated with District Council 33. This duty included an obligation

(a) to provide loyal, faithful, honest and disinterested services to them and their membership;

(b) to promote their best interest and welfare;

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embezzlement, as charged in counts one and five. The jury also found Earl Stout and William Stout not guilty of embezzling hospital funds to pay Frances Rooney's salary and to provide severance pay to discharge hospital employees, as charged in counts five and eleven. The jury was clearly able to understand my instructions on the law under 18 U.S.C. §666 and apply those instructions to the evidence since it acquitted the defendants of some of the charges. There is nothing to suggest that the jury understood my instructions when it acquitted the defendants of certain embezzlement charges, but did not understand my instructions when it convicted them of other embezzlement charges.

> (c) to conduct their business and affairs honestly and impartially, free from deceit, fraud, conflict of interest and in full accordance with the provisions of the AFSCME Constitution, the AFSCME Financial Standards Code, and the District Council 33 Constitution;
>
> d) to conduct the affairs of District Council 33 in accordance with the decisions of the Executive Board of District Council 33 and the decisions of the delegates and membership of District Council 33; and
>
> e) to conduct the affairs of the District Council 33 employee benefit funds, including but not limited to, the Health and Welfare Fund, the Legal Services Fund, and JFK Hospital, in accordance with the decisions of the respective Board of Trustees or Board of Directors and the respective Declaration of Trust or By-Laws.

Bill of Indictment, Count One, ¶16. The evidence at trial showed that Earl Stout conducted JFK Hospital financial affairs in contravention of the hospital's governing documents and the decisions of its board of directors. *See supra* sections II.A.2.-II.A.4. According to the government's theory of prosecution, such conduct was not authorized by the hospital's board of directors because, *inter alia*, it was in breach of Stout's fiduciary duty to the hospital and District Council 33. At trial, Stout conceded that he owed a fiduciary duty to District Council 33 which required him to be honest and loyal, to act in the best interests of the union, and to disclose his activities on behalf of the union to the membership. N.T. 4/26/90 at 31-33. Stout also acknowledged that he was bound, in his official capacity, by the hospital's governing documents. N.T. 4/26/90 at 33-44. Thus, with respect to the embezzlement counts, Stout admitted that his purported "blanket

authority" to hire and fire personnel and to dispense JFK Hospital funds was subject to the hospital's governing documents and circumscribed by his fiduciary duty to the hospital, its board of directors, and the union members. It was therefore entirely appropriate for me to define the term "fiduciary duty" for the members of the jury[22] and to instruct them that in determining the scope of Stout's authority and whether he acted within that scope, they could consider whether he breached his fiduciary duty as alleged. William Stout's assertion that the instruction on fiduciary duty "was an extraordinary *Stirone* amendment to broaden the basis for conviction" is contradicted by the record and by the indictment itself.

In the mail fraud counts, the government charged that Earl Stout and Cynthia Bullock participated in a scheme to defraud District Council 33 and the Legal Services Fund, while Earl Stout and William Stout engaged in a scheme to defraud District Council 33 and JFK Hospital. Because there was evidence at trial to support the government's theory that Earl Stout defrauded the aforementioned union entities through willful and intentional concealment and nondisclosure, *see supra* sections II.A.2.-II.A.6., it was necessary to instruct the jury that an omission could give rise to a fraud where there is a duty to act. N.T. 5/2/90 at 67. According to his own testimony, Stout's duty to act could have arisen out of his fiduciary duty to the union, including the Legal Services

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[22] I note that the language I used to define fiduciary duty, N.T. 5/5/90 at 47-48, was premised upon Stout's admission at trial and his own understanding of that duty, N.T. 4/26/90 at 31-33.

Fund and JFK Hospital. Thus, incorporating a fiduciary duty instruction into the mail fraud counts was consistent with the bill of indictment, the proof at trial, and the government's theory of prosecution.

Contrary to defendants' argument, the Ninth Circuit's holding in *United States v. Andreen*, 628 F.2d 1236 (9th Cir. 1980), supports rather than refutes the fiduciary duty instruction given at trial. In *Andreen*, the defendant, an attorney, was convicted of embezzling union trust funds in violation of 18 U.S.C. § 664, a statute similar in purpose to 18 U.S.C. § 666. In discussing the scope of section 664, which governs theft or embezzlement from employee benefit plans, the court held that "[t]he statute goes beyond traditional concepts of embezzlement . . . and imposes liability for an intentional breach of *special fiduciary duties imposed by* other regulatory statutes or *governing instruments.*" *Id.* at 1241 (emphasis added). Such "governing instruments" would include the union's by-laws and trust documents. The court continued:

> The essence of the crime is theft and in the context of union funds or pension plans the offense includes a taking or appropriation that is unauthorized, if accomplished with specific criminal intent. In this respect lack of authorization may be shown if the diversion is substantially inconsistent with the *fiduciary purposes and objectives of the union funds or pension plan, as set forth by statutes, bylaws, charters, or trust documents which govern uses of the funds in question.*

Id. (emphasis added). The court noted that "whatever imprecision attends this definition" is remedied by the requirement that the government prove scienter. *Id.* After I instructed the jury on fiduciary duty, I informed them

that they should use that explanation and the evidence introduced at trial to determine whether Earl Stout "knowingly and intentionally exceeded [the scope of his] authority." N.T. 5/2/90 at 48. Under the analysis in *Andreen*, upon which both defendants rely, William Stout's contention that my fiduciary duty instructions gave the jury "no workable standard to apply" is meritless.

Finally, defendants are incorrect that my charge permitted the government to satisfy its burden of proof and to obtain a conviction on the embezzlement counts if the jury merely determined that Stout breached his fiduciary duty to the hospital and District Council 33. My fiduciary duty instruction allowed the jury to find that Stout acted without valid authority only if the government had proved beyond a reasonable doubt that he knowingly and intentionally breached his fiduciary duty. Moreover, as explained previously in section II.E.2, I specifically instructed the jury to find the defendants "not guilty" unless the government also proved beyond a reasonable doubt that Stout acted voluntarily, intentionally, and "with a bad purpose to disobey or disregard the law."

4. Lack of Intent to Benefit

William Stout argues that I committed "fundamental error" by failing to instruct the jury it could not convict the defendants of embezzlement absent proof that Earl Stout had no intent to benefit the corporation. William borrows the concept of "intent to benefit" from those cases analyzing criminal convictions pursuant to section

501(c) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(c). Section 501(c) prohibits embezzlement from union funds.[23] In some prosecutions under section 501(c), the defense has argued that union authorization cured an alleged misappropriation. Alternatively, the defense has claimed that if the union benefitted from an unauthorized expenditure, no crime was committed. Those circuits analyzing the issue have generally held that a defendant's intent to benefit is irrelevant if the expenditure was unauthorized, but that intent to benefit may be a defense if a misappropriation was authorized. *See Andreen*, 628 F.2d at 1242 (collecting cases). Hence, the question of intent to benefit under section 501(c) only arises where the government has prosecuted a case on a theory that an expenditure of union funds was authorized but illicit. *See United States v. Dixon*, 609 F.2d 827, 829 (5th Cir. 1980). In *Dixon*, the Fifth Circuit held that in cases involving authorized use, the government must prove that the defendant " 'lacked a good faith belief that the expenditure was for the legitimate benefit of the union.' " *Id.* (quoting *United States v. Bane*, 583 F.2d 832, 835-36 (6th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979)). In the government's case against Stout, it chose to pursue only the theory that Stout's actions were unauthorized. Had the government failed to prove lack of authorization, under my instructions, the jury would have found defendants not guilty.

What William assigns as error is the absence of an instruction that would have been inconsistent with the

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[23] State and municipal unions, such as District Council 33, are exempt from the LMRDA, 29 U.S.C. § 402(e), (i).

holdings in the cases on which he relies. On the other hand, if an instruction were based on those authorities, it would have made the government's case easier to prove by providing an alternative means to obtain a conviction – proving lack of intent to benefit despite authorization – on a theory not pled in the indictment. In any event, the "intent to benefit" concept as a bar to conviction was implicit in my instructions. Since guilt had to be premised upon a finding that Earl Stout intended "to do something the law forbids, that is, with a bad purpose to disobey or disregard the law," the jury must have rejected any notion that the defendants intended for the hospital to benefit in some way from no-show employees, the Ethiopian trip, and the prepayment of insurance premiums.[24]

5. Bona Fide Wages or Expenses

Section 666(c) of Title 18 provides a statutory exception to the offense described in section 666(a) by excluding expenditures for "bona fide salaries, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business." I quoted this exception to the jury and explained that if the charged expenditures were bona fide payments of wages or expenses, there would be no embezzlement. N.T. 5/2/90 at 136. William Stout claims that I erred by refusing to

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[24] Similarly, William Stout finds fault with my failure to instruct the jury that "if authorization existed there was no need to disclose." Instead, I instructed the jury that if authorization existed, the government has failed to prove an element required to obtain a conviction under 18 U.S.C. § 666. William Stout's requested instruction would have been superfluous.

instruct the jury that the government was required to prove beyond a reasonable doubt that Stout's expenditures were *not* bona fide wages or expenses. Generally, the government need not charge statutory exceptions in the negative and prove them as such at trial unless the exception is so incorporated into the language of the statute defining the crime that the elements of the offense cannot be accurately described if the exception is omitted. C. Wright, 1 *Federal Practice and Procedure* § 125 at 371-72; *McKelvey v. United States*, 260 U.S. 353 (1922). In this case, the exception for bona fide expenditures was not incorporated into the language of the offense and therefore was not an element of the crime. The notion that payments which were authorized would necessarily be bona fide, and vice versa, was implicit in my charge. My instruction in this regard was proper and sufficient.

6. Other Alleged Errors

Defendants briefly mention several other alleged instructional errors, also unsupported by legal argument or references to the record. They warrant little discussion.

William Stout states that I neglected to inform the jury that in the context of mail fraud, in order to find that a defendant committed a fraudulent omission, there must first be a determination that the defendant had a duty to disclose of which he was aware. On page 67 of the charge, I stated: "A fraudulent omission is simply a failure to act where there is a duty to act and where that failure is reasonably calculated to deceive people of ordinary prudence and comprehension." N.T. 5/2/90. On page 66, I instructed the jury that the government was required to

prove beyond a reasonable doubt "that the defendant in question willfully participated in that [fraudulent] scheme with knowledge of its fraudulent nature and with intent to defraud." N.T. 5/2/90. It is implicit that a defendant could not act willfully, intentionally, and with knowledge of a scheme's fraudulent nature if he was unaware of his duty to disclose. There is no basis in the record for William Stout's objection.[25]

William Stout also claims that I failed to inform the jury that it was required to resolve the factual issue of whether the alleged "ghost" employees ever performed services for the hospital. This claim, too, is contradicted by the record. I explained to the jury that the services Meyers, Brown, Lagocki, and Jones performed could be evidence of Stout's intent. Furthermore, regardless of the actual services performed, if Stout placed these men on the JFK Hospital payroll with the expectation that they would perform services, this would likely be within this authority to hire and fire. N.T. 5/2/90 at 51. As requested by defense counsel, I also instructed the jury that it should not examine the value of the services actually rendered to determine whether Stout acted within the scope of his authority. *Id.* No defendant requested an instruction that would have required a verdict of not guilty if the jury found that Stout intended that the

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[25] Earl Stout maintains that my definition of fraudulent omission is legally incorrect. At oral argument, I asked Stout's attorney to furnish me with a case containing what she believed to be the proper definition. N.T. 7/6/90 at 42. Counsel did not supplement the record. My definition is the standard in this circuit. *See United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978).

"ghosts" perform no services, but, in fact, they did perform services; hence, no such instruction was delivered. I note that in any event, there was not a shred of evidence to warrant such a charge.

Earl Stout objects to the "ostrich instruction" I gave in the mail fraud charge informing the jury that a defendant's willful blindness or indifference to the existence of a scheme to defraud which would otherwise be obvious to him can satisfy the knowledge requirement. N.T. 5/2/90. Stout neglects to provide me with what he believes to be the appropriate legal instruction for knowledge derived from willful blindness. The instruction the jury received is consistent with the strict standard articulated by the Seventh Circuit in *United States v. Ramsey*, 785 F.2d 184, 190-91 (7th Cir.), *cert. denied sub. nom., McCreary v. United States*, 476 U.S. 1186 (1986). Furthermore, there is evidence in the record to warrant such an instruction. From Stout's refusal to consider motions to limit and delineate his authority at executive board meetings, from his abrupt adjournment of board meetings when members challenged his authority, and from his refusal to discuss expenditures of hospital and Legal Services Fund money when requested to do so, the jury was properly allowed to decide whether Stout remained willfully blind and indifferent to his lack of actual authority.

Lastly, William Stout states that "the court erred in . . . the verdict slip on count 43 by creation of duplicity in this count which required that the defendant be acquitted twice to be found not guilty." Defendant, of course, fails to explain how the verdict slip created "duplicity" as to count forty-three and the legal basis for his objection. Count forty-three charged that Earl Stout and William

Stout committed mail fraud when they caused a total of three documents and two checks to be mailed to New York Life Insurance Company to change the ownership and beneficiary on Earl Stout's life insurance policies and to prepay the future premiums on those policies. Because the evidence failed to show that Earl Stout had knowledge of the two prepayment checks and two of the documents, the forms requesting acceptance of the prepayments, I removed his name from the indictment where the checks and prepayment forms were listed. Earl Stout's name remained in count forty-three along with William Stout's name where the change in ownership and beneficiary form was listed. The verdict sheet was similar to the indictment in this regard. Thus, the jury was aware from the composition of count forty-three in both the bill of indictment and the verdict sheet and from my instructions to them, N.T. 5/2/90 at 92, that although both defendants were charged in count forty-three, William Stout, alone, was alleged to have been responsible for four of the five items which constituted a single mailing. Earl Stout was alleged to have been responsible, along with William Stout, for the fifth item only, and therefore he could only be convicted of count forty-three if the jury found that he caused this particular item to be mailed with a fraudulent intent and to further the alleged mail fraud scheme. William Stout's guilt as to *either* the prepayment forms and checks *or* the change in ownership beneficiary form, or *both*, was sufficient to sustain a conviction as to the entire count. There was nothing duplicitous or improper about the construction of count forty-three.

Finally, Bullock is hardly entitled to a new trial on the ground that I interrupted counsel during his closing argument and instructed him not to argue the law to the jury. As counsel for defendant well knows, it is the court's province, not counsel's, to instruct the jury on the law. It was incumbent upon me to interrupt counsel to prevent the risk that the jury would be confused between his instructions and mine. Any prejudice which defendant suffered is negligible compared with the potential prejudice which all the parties would have suffered had I permitted counsel to continue.

III. CONCLUSION

Earl Stout's motion for judgment of acquittal will be granted as to count seven for insufficient evidence that the payment of Dr. Leichner's medical malpractice insurance premiums constituted embezzlement pursuant to 18 U.S.C. § 666(a)(1)(A). William Stout's motion for judgment of acquittal will be granted as to count seven on the same basis, and as to count six for insufficient evidence that William intended to deprive the hospital of its money without authorization. In all other respects, the Stouts' motions for judgment of acquittal will be refused. Cynthia Bullock's motion for judgment of acquittal of her mail fraud convictions lack merit and will be denied. Earl Stout's motion for arrest of judgment will be denied because the indictment charges a criminal offense under 18 U.S.C. § 666(a)(1)(A). The defendants' motions for a new trial on the basis of alleged instructional errors will be refused because my charge properly explained the law and, based on the evidence and the arguments of counsel,

outlined the questions which the jury was required to answer.

F. Cynthia Bullock's Motion for a New Trial

Bullock makes three claims of error which she alleges entitle her to a new trial: that I improperly and unfairly amended the proposed jury instruction regarding Bullock's services for the Legal Services Fund; that I erred in permitting Jacqueline Green to testify that the checks described in the mail fraud counts were placed in the United States mail over counsel's objections; and that I erred by interrupting counsel during his closing argument and instructing him not to argue the law to the jury. Bullock's claims lack merit and will therefore be refused.

Bullock's first argument is premised on the following mail fraud charge which I gave to the jury:

> In order for you to be warranted to convict on this count, you must find beyond a reasonable doubt that Miss Bullock did not perform any compensable service for the Legal Services Plan.
>
> If you believe that she performed some compensable service for the Legal Services Plan, then you must find the defendants not guilty on these counts. You should not substitute your idea of whether or not the compensation was fair in light of the work performed, but rather must find the defendants not guilty if you have a reasonable doubt as to whether or not any compensable services were performed.

N.T. 5/2/90 at 78-79. Bullock had requested a substantially similar charge which did not include the word "compensable." The government agreed to Bullock's proposed instruction.

Bullock is incorrect that I "accepted" her requested instruction. In fact, I informed all counsel on several occasions during the Rule 30 conference that I did not intend to be bound by any of their submissions, and that I would most likely use my own language to charge the jury using their submissions as a guide. I did, however, inform counsel as to those submissions which I had rejected. There is no legal requirement that I accept a defendant's points for charge, even when they are "unopposed." Thus, I did not "change the rules at the end of the game" as Bullock contends.

Nor did I "add an element not charged in the indictment." The indictment charged Bullock with knowingly and willfully participating "in a scheme to defraud District Council 33 and the District Council 33 Legal Services Fund and to obtain money and property by means of false and fraudulent pretenses, representations and promises. . . . " The indictment alleged that in furtherance of this scheme, "Earl Stout . . . direct[ed] the withdrawal of funds from the Legal Services Fund . . . to pay defendant Cynthia Bullock after she had been terminated as Director of the Legal Services Plan and was no longer providing any services to the Legal Services Plan." A constructive amendment of an indictment occurs where a trial court's instructions alter the essential elements of the offense set forth in the indictment and thereby permit the jury to convict the defendant of an offense different from or in addition to that charged in the indictment. *United States v. Begnaud*, 783 F.2d 144, 147 & n. 4 (8th Cir. 1986). For example, in *Stirone v. United States*, 361 U.S. 212 (1960), the defendant was indicted on a charge of obstructing imports of *sand* to Pennsylvania by means of

extortion in violation of the Hobbs Act. The prosecution introduced evidence that the defendant had also obstructed the export of *steel* from Pennsylvania. The trial court instructed the jury that it could convict the defendant if it found that he had obstructed shipments of sand into Pennsylvania *or* shipments of steel out of Pennsylvania through extortion. The Supreme Court reversed defendant's conviction, concluding that the jury may have convicted him on the basis of the steel shipments, an offense not alleged in the indictment, but not the sand shipments. *Id.* at 217-19.

In Bullock's case, there is no question that I charged the jury on the same elements of mail fraud as set forth in the indictment. Although my instructions did not track the language of the indictment, they fully apprised the jury that Bullock stood accused of engaging in a scheme to defraud the Legal Services Fund and District Council 33 by receiving money and benefits from the fund to which she was not entitled. My instructions did not expose Bullock to a risk of being convicted of an offense not charged in the indictment, *id.* at 217, nor did they expose her to a risk of being prosecuted twice for the same offense, *Berger v. United States*, 295 U.S. 78 (1935). At trial, the government presented evidence that Bullock held herself out as a "consultant" to the Legal Services Fund and was placed on the payroll as such. Although the issue of whether Bullock ever performed consulting services for the plan was disputed at trial, the defendant never so much as raised an *inference* that while she may not have performed "compensable" consulting services for the plan, she performed "non-compensable" consulting services instead. Indeed, I am at a loss to comprehend

the distinction which defendant claims exists between "compensable" and "non-compensable" services as those terms have been used here.[26] If the jury had found that Bullock performed services for the plan, it was not permitted, under my instructions, to evaluate "whether or not the compensation was fair in light of the work performed." N.T. 5/2/90 at 79. Thus, *any services* which Bullock performed for the plan would, in light of my instructions, have been "compensable" services. There is no danger that the jury might have found that Bullock performed services, but nonetheless convicted her on the basis that those services were "non-compensable."

As to defendant's allegation regarding Green's testimony on the mailings charged, the record reflects the fact that Green was permitted to answer the following questions from the government over defendant's objection:

> Q: How, if any way, did you pay those bills, Miss Green?
>
> . . . .
>
> A: I prepared the bills and put them in the mail.
>
> . . . .
>
> Q. When you say "the mail," what type of mail are you referring to?
>
> . . . .
>
> A. First Class United States mail.

N.T. 4/19/90 at 30-31. Contrary to defendant's argument, there was nothing improper or leading about the government's questions.

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[26] Defendant has not alleged in her brief that any distinction exists.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL
vs.	:	No. 89-317-1-2-3
EARL STOUT, WILLIAM STOUT, and CYNTHIA BULLOCK	:	

ORDER

AND NOW, this 18th day of September, 1990, for the reasons set forth in the accompanying opinion, it is hereby ordered that:

1. Earl Stout's motion for judgment of acquittal is granted as to count seven. In all other respects, his motion is denied.

2. Earl Stout's motion for arrest of judgment is denied.

3. Earl Stout's motion for a new trial is denied.

4. William Stout's motion for judgment of acquittal is granted as to counts six and seven. In all other respects his motion is denied.

5. William Stout's motion for a new trial is denied.

6. Cynthia Bullock's motion for judgment of acquittal is denied.

7. Cynthia Bullock's motion for a new trial is denied.

BY THE COURT:

/s/ J. William Ditter, Jr.

J.